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THE
ONTARIO REPORTS

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (THE COURT OF APPEAL FOR
ONTARIO AND THE HIGH COURT OF
JUSTICE FOR ONTARIO).

CITED [1942] O.R.

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JUDGES
OF THE
SUPREME COURT OF ONTARIO
DURING THE PERIOD OF THESE REPORTS.

THE COURT OF APPEAL FOR ONTARIO.

Chief Justice of Ontario.

The Honourable ROBERT SPELMAN ROBERTSON.

Justices of Appeal.

The Honourable WILLIAM RENWICK RIDDELL.

The Honourable WILLIAM EDWARD MIDDLETON.

The Honourable CORNELIUS ARTHUR MASTEN.

The Honourable ROBERT GRANT FISHER.

The Honourable WILLIAM THOMAS HENDERSON.

The Honourable CHARLES PATRICK McTAGUE.

The Honourable JOHN GORDON GILLANDERS.

The Honourable ROY LINDSAY KELLOCK.

THE HIGH COURT OF JUSTICE FOR ONTARIO.

Chief Justice of the High Court.

The Honourable HUGH EDWARD ROSE.

Judges of the High Court of Justice.

The Honourable JOHN ANDREW HOPE.

The Honourable GEORGE FRANKLIN McFARLAND.

The Honourable JAMES CARDWELL MAKINS.

The Honourable FREDERICK DRUMMOND HOGG.

The Honourable JOHN KEILLER MACKAY.

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The Honourable JOHN MILTON GODFREY.

The Honourable GEORGE ALEXANDER URQUHART.

The Honourable JAMES GERALD KELLY.

The Honourable CHARLES PERCY PLAXTON.

The Honourable DANIEL PATRICK JAMES KELLY.

The Honourable FRED HOLMES BARLOW.

ATTORNEY-GENERAL FOR ONTARIO.

The Honourable GORDON DANIEL CONANT, K.C.

MEMORANDA.

The Honourable JAMES GERALD KELLY, a Judge of the High Court of Justice, died on 31st July 1942.

The Honourable CORNELIUS ARTHUR MASTEN, a Justice of Appeal, died on 31st August 1942.

DANIEL PATRICK JAMES KELLY, one of His Majesty's counsel, was appointed a Judge of the High Court of Justice on 1st September 1942.

The Honourable JOHN MILTON GODFREY, a Judge of the High Court of Justice, resigned his office and his retirement was made effective by Order in Council dated 13th November 1942.

ROY LINDSAY KELLOCK, one of His Majesty's counsel, was appointed a Justice of Appeal on 15th December 1942.

FRED HOLMES BARLOW, one of His Majesty's counsel, and Master of the Supreme Court of Ontario, was appointed a Judge of the High Court of Justice on 15th December 1942.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

1942

[GREENE J.]

Richardson v. The City of Windsor.

Negligence—Dangerous Premises—Position of Visitor to Municipal Park—Duty of Municipal Authorities Limited to Warning of Known Dangers.

A visitor to a municipal park is not an invitee but a mere licensee, and the liability of the municipal authorities is limited to cases in which there is a concealed danger known to them but unknown to the licensee, and which the licensee could not be expected to avoid: *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212, applied.

AN action for damages brought by the plaintiff as administrator of the estate of Gershon Gelber, under The Fatal Accidents Act, R.S.O. 1937, c. 210. The facts sufficiently appear from the judgment.

The action was tried by GREENE J., at Windsor, on November 25th and 26th, 1941.

Lorne R. Cumming, for the plaintiff.

James H. Clark, K.C., for the defendant.

January 31st, 1942. GREENE J.:—The plaintiff sues as administrator of the estate of Gershon Gelber under The Fatal Accidents Act, R.S.O. 1937, c. 210.

On the 7th day of August, 1938, the deceased Gershon Gelber visited a park maintained by the defendant corporation. Some time in the late afternoon, or early evening, he fell in the park and sustained injuries which resulted in his death two days later.

The defendant corporation had allowed a philanthropic organization interested in youth welfare to set up a tennis court on a grassy portion of the park. Some distance beyond each end of the court there had been erected a fence of wire netting to act as a "back-stop" for the tennis balls when they passed the players. Gelber was accompanied by two sons, one aged at the

time about twelve years and the other about six years. According to their evidence they were ahead of their father in leaving the park, heard him cry, and on returning to him found him lying across the wire netting with the end stake on the ground.

The case for the plaintiff really narrowed down to an allegation that the fence in question was a trap, it being alleged that while the stakes supporting the fence were visible in the dusk, the wire netting between the stakes was not visible in a failing light.

The evidence is not as satisfactory as it might be, that the fence was the cause of Gelber's fall, and it is possible that he tripped before reaching the fence and fell against it, but on the whole evidence the reasonable conclusion to draw is that the fence had something to do with his fall.

The plaintiff, however, did not establish, in my opinion, that the light at the time Gelber and his sons left the park had failed sufficiently to make it difficult to see the fence. Gelber had never visited this park before and entered by a gravelled walk which was quite close to the place where he and his sons were when they decided to leave the park. If the light had failed to such an extent as to make it difficult to see objects of any kind it would seem only reasonable that a stranger to the park should have left it by a pathway which was convenient and of the existence of which he was aware. However, in my opinion, the weight of the evidence is that the light had not failed and anyone exercising ordinary care would have seen the fence.

Counsel for the plaintiff argued that Gelber was an invitee, but that even if he was not an invitee the defendant corporation owed him a higher duty in the matter of care than that owed to a mere licensee. *Ellis v. Fulham Borough Council*, [1938] 1 K.B. 212, has now settled beyond question, for the time being at least, that a visitor to a municipal park is not an invitee but a licensee. The same case confirms the rule that the licensor would only be liable if there was a danger which was known to it but not known to the licensee, and which the licensee could not be expected to avoid.

It was not known to the municipal authorities or the park officials, that any danger existed from the fence, and no complaints were made to any of the municipal or park employees.

On the two grounds that the weight of the evidence indicates that there was still sufficient light to enable Gelber to see the

fence if he was taking proper care, and that there was no concealed danger known to the park authorities not known to Gelber, the action must fail. The action is dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff: Croll & Croll, Windsor.

Solicitors for the defendant: Clark & Zeron, Windsor.

[COURT OF APPEAL.]

Rex v. Dean.

Evidence—Criminal Trial—Identification of Accused—Use of Police Photograph—Photograph Showing Fact of Previous Conviction—Subsequent Admission by Accused in Cross-examination.

It is improper for the Crown to produce as an exhibit at the trial a police photograph of accused, if this photograph bears notations indicating that accused has been previously convicted. The use of such a photograph as part of the Crown's case will necessitate a new trial, even if accused has later gone into the witness-box and admitted his previous convictions in cross-examination.

Remarks on the undesirability of showing photographs of an arrested person to a witness immediately before the witness is taken to identify such person at a police "identification parade" (*per* Masten J.A.).

AN appeal from conviction by a judge and jury. Conviction set aside and new trial ordered. The facts and the arguments of counsel appear from the following judgments.

January 12th, 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and MASTEN JJ.A.

G. A. Martin, for accused, appellant.

W. B. Common, K.C., for the Crown, respondent.

February 2nd, 1942. ROBERTSON C.J.O.:—This is an appeal from the conviction of the appellant on his trial before Chevrier J. and a jury, at the Fall Assizes at Ottawa, on the 25th September, 1941, on a charge that on the 17th April, 1939, at the City of Ottawa, being then armed with an offensive weapon, to wit, a revolver, he did unlawfully assault one William Softy, contrary to s. 446(c) of the Criminal Code, R.S.C. 1927, c. 36. There is an appeal also from the sentence of ten years' imprisonment in the penitentiary.

One Stephens, who was arrested while trying to escape from the scene of the assault, was charged with the offence on the same day and pleaded guilty and was sentenced to a term of four

years' imprisonment. The assault was committed by Stephens and another man, who did escape. The substantial question at the trial was whether the appellant was that other man. Appellant was not arrested until August 12th, 1941, when he was taken into custody at Hamilton and charged with the offence.

The assault took place in a bowling-alley and billiard room in an upper storey of a building on Sparks Street in Ottawa. The place had been closed for the night two or three hours before the assault and when Softy, who was the caretaker, arrived shortly after 2 a.m. to clean up, he encountered two men armed with revolvers. Softy could not identify appellant as one of them. When asked, "Have you ever seen that man before the trial herein," he answered "No, I did not." It should be stated, however, that the two men who assaulted him then wore masks over their faces which they lost in the fight with one Boivin, who soon came on the scene. Stephens was called as a witness for the Crown, and he positively identified the appellant as his companion in the crime. Stephens being an accomplice, evidence corroborating him was important. The most substantial evidence corroborating Stephens as to identity was given by Boivin. Boivin is a painter who, at the time of the assault on Softy, was engaged in painting the premises immediately below the bowling-alley. Hearing unusual noises overhead he proceeded upstairs to investigate and became engaged in a violent fight with the two men who had encountered Softy. In the meantime, Softy, who evidently did not think his duties as caretaker involved any fighting, was lying on his back on the floor and keeping quiet, as he had been told to do. Hearing the noise of the fight with Boivin, he seized the occasion to get through a window and shout for help. The police came and caught Stephens, but the other man got away.

Boivin was seriously hurt in the fight and spent ten days in the hospital. After his discharge from the hospital the police showed him a number of photographs to see whether he could help them in their search for the man who had escaped, by picking out his photograph. Boivin picked out one of the photographs and said that was the man who had escaped. It is not now disputed that this is a photograph of the appellant. Further reference will be made later to this photograph, as its introduction in evidence affords the main grounds of appeal.

When appellant was arrested in August, 1941, at Hamilton, some two years and more after these events, he was brought to Ottawa and was placed in a "line-up" with several prisoners from the gaol, and Boivin was brought so that he might see whether he could identify him. Before Boivin was taken to the "line-up" the police again showed him a number of photographs in their rogues' gallery, including the photograph of the appellant that he had picked out in 1939. The detective who was in charge of the matter gives the following evidence:

"Q. One of your purposes in showing the picture again to Boivin in August, 1941, was for the purpose of making sure that he was the right man? Is that right? A. That was the purpose.

"Q. And also to refresh his memory because the pictures had been picked at random? Isn't that right? A. That is right."

At the "line-up" Boivin identified the appellant as one of his assailants. There can be no doubt that the act of the police in showing Boivin the photograph of appellant to refresh his memory before asking him to identify his assailant at the "line-up", is open to some adverse comment—see *Rex v. Dwyer*, [1925] 2 K.B. 799.

At the trial Boivin was called as a witness for the Crown. He said that appellant, then in the prisoner's dock, was one of the two men with whom he had fought in the early morning of 17th April, 1939. He also gave the following evidence:

"Q. Did you know the accused, Dean, before this occasion, Mr. Boivin? A. No, sir.

"Q. Had you ever had occasion to see him before? A. Well, yes, in the police line-up.

"Q. Before the 17th of April? A. No, sir; never.

"Q. Now, it slipped out—'the police line-up'. Tell his Lordship and the gentlemen of the jury about this police line-up. A. Well, I was asked to come to the police station to look at some men, to see if I could identify the accused, and I went there. They took me into a room. They had these men lined up in line."

He then gave a description of the "line-up" and of his identification of the appellant there. No reference whatever was made in the examination-in-chief to his having seen a photograph of appellant at any time.

On cross-examination counsel for the defence quite properly brought out the fact that Boivin had been asked to look at certain photographs in April or May, 1939, on which occasion he had picked out one photograph as that of the man who escaped. He also brought out the fact that in August, 1941, immediately before the line-up, he had again been shown this photograph. Defendant's counsel did not, however, ask for production of the photograph nor in any way identify it. On re-examination of Boivin, counsel for the Crown proceeded to prove the photograph. Objection was taken by defence counsel, and, I think, with some justification, that counsel for the Crown was establishing a new identification by photograph in re-examination when, of course, there would be no opportunity to cross-examine in regard to it. Counsel for the Crown had got himself into a difficult position by having his witness tell part only of the story on examination-in-chief. Then when that was impaired on cross-examination, he desired to prove on re-examination what was perhaps the most satisfactory identification, that made soon after the assault by picking out a photograph. The time to prove that was on examination-in-chief, if it was to be proved at all.

Counsel for the Crown said that it had not been his intention to introduce the subject of photographs at all, and while he did not say so, one may assume this was because of another objection to the photograph Boivin had identified that has now to be dealt with.

There was a discussion of the propriety of the course being taken by counsel for the Crown on Boivin's re-examination, and the jury was excluded for a time. Counsel for the appellant at this time made the further objection that the photograph that Crown counsel proposed to put in evidence would indicate that accused had been convicted of a crime. After a prolonged argument the jury was brought back and re-examination continued. Counsel for the Crown had Boivin identify the photograph he had picked out in 1939 and had seen again in August, 1941, and it was marked as an exhibit. The exhibit shows the head and shoulders of a man in two positions, one facing the camera, the other in profile. In the front view there is shown across the man's chest a badge or label with the word "Manitoba" and the number "3886" conspicuously displayed. On the back of the photograph there is typewritten:

“Robert G. Dean
“Alias—John A. Fromey, Jack A. Fromey,
Jack Dean, Fred Lewis
“R.C.M.P. No. 103514
“Manitoba No. 3886.
“Photograph March 3rd, 1936.”

This is followed by a statement of age, height, weight, complexion and other particulars. This plainly indicated a prior conviction.

It may be that the learned trial judge was not aware that he was admitting evidence of this character when he permitted the exhibit to be marked, but objection had been taken to it on that ground, as already stated.

It is argued for appellant that the Crown prevented him having a fair trial by introducing as part of its case in chief this evidence that the accused had been formerly convicted of an offence and had been imprisoned. It is answered for the Crown that whatever may be said about the filing of this exhibit, in the end no harm came of it as appellant became a witness in his own defence, and in the course of his examination-in-chief, being asked by his own counsel whether he had been previously convicted, said he had been convicted twice, once in California and once in Manitoba. It is said further that appellant on cross-examination was properly asked as to these prior convictions and gave some details with respect to them. Appellant's counsel replies to this that the appellant was forced into the witness box by the evidence of prior conviction improperly admitted against him as part of the Crown's case.

It would be difficult for the Court on this appeal to determine what course counsel for the defence would have taken at the trial if what is shown upon the photograph (Exhibit 10) had not been admitted in evidence, as it was, and the Court is not entitled to speculate upon the matter.

The fact that a photograph was introduced on re-examination and new evidence of identification given without even an opportunity for cross-examination upon it being afforded, was somewhat irregular, but, considering the whole evidence, one is strongly inclined to conclude that that circumstance alone did not affect the result, nor even become a matter of importance. Another witness, called for the prosecution later, verified the

photograph that had been put in evidence, as the one Boivin had picked out in 1939.

The introduction, with the same exhibit, of evidence that appellant had already been a convict is another matter. It was quite unnecessary to expose the objectionable matters to view, as they played no part in Boivin's identification. To make matters worse the detective in charge of the case, in the course of his evidence as a witness for the Crown, quite improperly gave evidence of a statement made by Stephens in regard to the photograph and with respect to the different names by which he had known the subject of it. Counsel for the Crown later in cross-examination of the appellant read out the several names on the back of the photograph and asked questions in regard to them. It is not open to counsel for the Crown to say that it was not intended to put all of this in evidence when the exhibit was marked.

It is not arguable that, when the question is whether the prisoner is the person who committed the crime charged, evidence that he is a former convict and that the police have his photograph in their gallery is not prejudicial to the prisoner. Not only does it affect his credibility as a witness, but even if he does not become a witness the knowledge will, in every probability, be weighed in the scales against him. It weakens the presumption of innocence to the benefit of which he is entitled.

Whether in the end a new trial will result to the advantage of the appellant is not for this Court to judge. Appellant did not have a fair trial and he is entitled to a new trial if he desires it. The conviction is, therefore, set aside and there will be a new trial.

MIDDLETON J.A.:—I agree that there must be a new trial. I hoped that this course might be avoided, but on reading the evidence, it is impossible. It cannot be said that the evidence, apart from the photograph, is clear and convincing. The sentence is long, and properly so in view of the guilt shown, but the question is as to the sufficiency of the proof at the trial.

For the reasons given by the Chief Justice, the trial cannot be said to have been conducted as it should have been, and thus there is no course open save to direct a new trial in which the previous conviction of the prisoner would not be made an element leading to his conviction.

At the trial, after the conviction and before sentence, the judge addressed the prisoner at considerable length. He reached the point at which he said:

"I do not think that you will be strong enough to say that this is the last time."

The prisoner interrupted and said:—

"May I say a word, my Lord?"

His Lordship: "Certainly. I will hear you."

Prisoner: "In my trial your Lordship mentioned instructing the jury that a time does come in the minds of a criminal or persons who have been imprisoned for more than once where they suddenly decide they will not commit another crime. My Lord, you may not believe it, but that transfer (*sic*) took place two and a half years ago. Any investigation would prove the truth of this statement. That that your Lordship mentioned was the most poignant fact that struck me in this trial. As your Lordship says, I may not be strong enough—in my opinion—I know I have not been strong enough, and for the past two and a half years I think my record will show the truth of that statement." His Lordship then renewed the address.

Bearing in mind that the crime was committed on the 17th of April, 1939, and the accused was being sentenced on the 26th September, 1941, it was hard to say that the prisoner was referring to that event as he speaks of two and a half years ago. Two and a half years, if he is counting by the calendar, antedates the crime. It is, to my mind, an admission of guilt, but it is not such as necessarily to preclude a new trial.

MASTEN J.A.:—This is an appeal by Robert C. Dean, alias John A. Fromey, from his conviction at the Fall Assizes of the Supreme Court of Ontario, held with a jury at Ottawa on the 25th September, 1941, upon which the accused was sentenced by Mr. Justice Chevrier to ten years' imprisonment.

I have had the opportunity of reading the reasons of judgment of my Lord the Chief Justice. His statement of facts is so lucid and complete that I refrain from any repetition, and I concur in his conclusion. I desire, however, to make one or two further observations.

The crucial point in this prosecution was the identification of the accused as a party to the offence. The direct evidence against the prisoner was given by John Stephens, an accomplice,

and, therefore, required corroboration. Corroborating evidence was given on behalf of the Crown through the witness Boivin, who had abundant opportunities of observing the features of the accused at the time of the assault, and whose evidence impresses me as being that of an honest witness who had an excellent opportunity of observation. His direct evidence identifying the accused is reinforced and strengthened by the circumstance that long prior to the arrest of the accused, namely, in the month of April or May, 1939, for the purpose of aiding the Crown in apprehending the guilty party (whoever he might be) Boivin was shown a variety of photographs and was asked whether he could pick out from among those photographs a picture of the second man who took part in the assault in question, and who escaped. Thereupon, Boivin, in 1939, very shortly after the occurrence of the assault picked out from the numerous photographs which were exhibited to him, the photograph of the accused as that of the man who took part in the assault in question. Thus assisted, the police, in 1941, located and arrested the accused.

In my opinion this exhibition of photographs to Boivin for the assistance of the police in discovering the wanted criminal was a proceeding entirely warrantable and proper, and in my opinion strengthens rather than weakens his direct evidence given at the trial, identifying the accused.

As is observed in *Rex v. Dwyer*, [1925] 2 K.B. 799, "The circumstances of different cases differ greatly and it is not easy to enunciate general rules. They are to be collected from the various cases that have been decided." It seems to be clear, however, from all the decisions that when a police officer is in ignorance or doubt as to who ought to be arrested, it is permissible and lawful to show photographs to persons, with the object of ascertaining whether they could pick out a person not yet in custody so that he might be arrested on suspicion: *Rex v. Kingsland* (1919), 14 Cr. App. R. 8; *Rex v. Dwyer*, [1925] 2 K.B. 799, at page 802; *Rex v. Hinds*, [1932] 2 K.B. 644; *Rex v. Bagley*, 37 B.C.R. 353, [1926] 2 W.W.R. 513, 46 C.C.C. 257, [1926] 3 D.L.R. 707; and see the cases cited in Wigmore on Evidence, 3rd ed., vol. III, para. 786(A).

In the *Hinds* case the appellants had escaped after a successful robbery with violence. Having been apprehended and found guilty they appealed on the ground of misdirection by the trial

judge (Avory J.). His charge, so far as it relates to this question, is as follows:

"The law, so far as it is necessary to apply it in this case, I tell you with regard to that matter is this: that there is no objection to the police who are seeking for information as to the person or persons who may have committed a crime showing to persons who are able to identify the criminal a photograph or a series of photographs to see if they can pick out any one of them which resembles the person whom they think they would be able to identify. What is objectionable is, if a witness has identified an accused person, for the police to try and corroborate the evidence of that witness by showing him or her a photograph of the actual person whom they have already identified; but there is no suggestion in this case that anything of that kind has been done. There is no ground for suggesting that the police have in any way infringed any rule of conduct in the showing of photographs to the witnesses who have been called in this case."

On page 647 of the same report the Court of Criminal Appeal held that Avory J.'s charge, as above quoted, was "a sufficient and correct direction". It held further, as appears by the head-note:

"It is not essential to the sufficiency of the summing-up that the Judge should state that the evidence of witnesses who have identified the defendant at an identification parade may possibly be of less weight by reason of their having previously picked out his photograph from amongst those of other persons."

A more difficult question arose in the present case with respect to a second inspection of photographs by Boivin in 1941 after the arrest and just before he was taken to a "line up"—or, as it is termed in England, an "identification parade". As is pointed out by the Chief Justice, this was admittedly done to refresh the memory of the witness.

Regarding that practice, it was said in the *Dwyer* case (*supra*), "It would be most improper to inform a witness beforehand who was to be called as an identifying witness by the process of making the features of the accused familiar to him through a photograph."

In the *Hinds* case (*supra*) the Court of Criminal Appeal pointed out that if the photographs had been shown to the witness after the arrest of the accused, "the matter would require

consideration, because there are cases, such as *Rex v. Haslam* (1925), 19 Cr. App. R. 59, in which this Court has expressed the view that it is undesirable that photographs of a person already under arrest should be shown to witnesses just before attending an identification parade for the purpose of seeing whether they pick out that person as the person whom they suspect."

The decisions in the provincial Appellate Courts of Canada also indicate the impropriety of such a practice on the part of the police. The resultant effect of such improper showing of photographs, subsequent to the arrest, is by no means clear. In some cases the conviction has been quashed and in others sustained. In the present case, for reasons about to be stated, it becomes unnecessary to determine that question, and I prefer to leave it for decision until it necessarily arises.

It is a thoroughly settled principle of criminal law that the Crown cannot, in making its case against the prisoner, give evidence of his bad character, or of previous convictions. It clearly appears that the photograph (Exhibit 10) produced by the Crown in its re-examination of Boivin, carries endorsed upon it a record of his previous convictions, as has been pointed out in the judgment of my Lord the Chief Justice. This record was not only produced in evidence by the Crown, but was exhibited to the jury, contrary to the rule above stated. The picture when tendered ought to have been rejected.

In *Rex v. Dwyer*, [1925] 2 K.B. 799, at page 801, Lord Hewart C.J., speaking for the Court of Criminal Appeal, says:

"In the second place, during the trial photographs of the two prisoners were produced for the inspection of the jury and were inspected by the jury. Those photographs are now before the Court. There are two documents, each document containing two photographs. One document refers to one prisoner, the other document to the other prisoner, and there is shown with great clearness upon each of those documents a photograph, full face and profile, of the prisoner referred to, and the prisoner is wearing upon his right breast a large ticket stamped with the prison number. These photographs having been handed to the jury, it was apparent to the jury that the prisoners had been previously convicted. It was just as clear a statement to the jury that the prisoners had been previously convicted as would have been sworn evidence to that effect. In those circumstances, counsel, who has urged the case for these appellants with so

much clearness and force, says that these convictions cannot stand. In the opinion of this Court that is right. The appeals must be allowed and the convictions quashed."

In *Cassidy v. The King*, 50 Que. K.B. 388, 56 C.C.C. 101, [1931] 4 D.L.R. 192, the principle above stated was adopted following the views previously expressed by the Supreme Court of Canada in *Allen v. The King* (1911), 44 S.C.R. 331, 18 C.C.C. 1, and *Gowin v. The King*, [1926] S.C.R. 539, 46 C.C.C. 1, [1926] 3 D.L.R. 649.

The question of whether the Court should, in such a case as the present, apply the provisions of s. 1014(2) of the Criminal Code, was elaborately discussed in the unanimous judgment of the Court of Appeal in Alberta, in *Rex v. McLaren*, [1935] 2 W.W.R. 188, 63 C.C.C. 257, [1935] 3 D.L.R. 165, where Mr. Justice Clarke spoke as follows:

"I have considered whether or not having regard to s. 1014(2) of the Code, the Court would not be justified in dismissing the appeal on the ground that no substantial wrong or miscarriage of justice had actually occurred as there was I think ample evidence to justify the conviction, but I cannot say that the evidence in question may not have operated prejudicially to the defendant. Were I a jurymen I think it would have told strongly with me; in such a case as this where guilty knowledge is in issue and following the rule established in *Allen v. The King*, [*supra*], I think the proper course is to set aside the conviction and order a new trial. The rule as stated in the S.C.R. headnote being 'that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shown that it did in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the Court of Appeal may order a new trial.' "

And McGillivray J.A., supporting the judgment of Clarke J.A., quotes at length from the words of Lord Sankey in *Maxwell v. Director of Public Prosecutions* (1934), 103 L.J.K.B. 501, at page 508.

These decisions make it entirely clear, not only that it is essential to a fair trial that the rule as stated in *Rex v. Dwyer* should be maintained inviolate, but also that it is impossible for this Court to say whether, in the absence of evidence of

Dean's previous criminal record the jury would have found Boivin's evidence adequate to corroborate Stephens, and whether they would or would not have recorded a verdict of guilty. Consequently, I find it to be my melancholy conclusion that the production by the Crown in making its case against Dean, of his previous criminal record, necessitates quashing the conviction and necessitates the expense of a new trial.

That being so, I say nothing with respect to the sentence. I desire to state expressly, however, that nothing I have said is intended to vary or modify in any way the observations of this Court in *Rex v. Goldhar*, 76 C.C.C. 270, [1941] 2 D.L.R. 480.

Appeal allowed and new trial ordered.

Solicitors for the accused, appellant: Harry Sigler, Ottawa, and A. Minden, Toronto.

Solicitor for the Crown, respondent: W. B. Common, Toronto.

[COURT OF APPEAL.]

**Lewis and Schuler v. Pharand; General Security Insurance
Company of Canada (Third Party).**

Insurance—Automobile Liability Policy—Action against Insured by Victim of Accident—Right of Insurer, if its Liability to Insured Disputed, to be Added as Third Party in Action—The Insurance Act, R.S.O. 1937, c. 256, s. 205(7)—Position where Insured Does Not Defend Action.

The special statutory provision contained in s. 205(7) of the Insurance Act, R.S.O. 1937, c. 256, whereby an insurer, which disposes its liability to its insured under a policy insuring against liability to third persons arising out of the operation of an automobile, can be added as a third party in an action brought against the insured by such a third person, should not be so applied as to defeat the rights of the plaintiff in the action against the defendant, e.g., to sign default judgment if the defendant does not appear. *Semble*, the special procedure is wholly inapplicable except where the insured defends the action. *Marshall v. Adamson*, [1936] O.R. 103, 3 I.L.R. 159, [1936] 1 D.L.R. 635, considered.

AN appeal by leave of Mackay J., dated January 19th, 1942, from an order of McFarland J., varying an order of O. E. Lennox, Esq., Assistant Master.

The plaintiffs claimed damages for personal injuries sustained when they were struck by the defendant's automobile. The defendant, who was not a resident of Ontario, did not enter an appearance. An insurance company, which had issued a

policy insuring the defendant against such claims, and which disputed its liability to the defendant under this policy, then applied, under s. 205(7) of the Insurance Act, R.S.O. 1937, c. 256, to be added as a third party in the action.

The orders of the Assistant Master and of McFarland J. are set out in the judgment of McTague J.A. as follows:

1. Order of the Assistant Master, dated December 2nd, 1941:

"Upon the application of General Security Insurance Company of Canada for an order under s. 205(7) of the Insurance Act making the applicant a third party in this action and for such further and other order as may be fitting, in the presence of counsel for the applicant and for the plaintiffs, upon reading the affidavit of John Hewitt Amys filed and the writ of summons and statement of claim in this action, and upon hearing what was alleged by counsel aforesaid:

"(1) It is ordered that General Security Insurance Company of Canada be added as a third party in this action under the provisions of s. 205(7) of the Insurance Act, R.S.O. 1937, c. 256, and be bound by the findings between the plaintiffs and the defendant at the trial of this action;

"(2) And it is further ordered that the third party do within ten days from the date of this Order, deliver a statement of defence to the plaintiffs' claim against the defendant; and that the plaintiffs do deliver their reply thereto, if any, within ten days after the service of such statement of defence;

"(3) And it is further ordered that the third party may have production and discovery in the usual manner from the plaintiffs;

"(4) And it is further ordered that the third party shall be at liberty to appear by counsel at the trial of this action and to defend this action as it may be advised and to cross-examine all witnesses called by the plaintiffs at the trial of this action and to call and examine witnesses in the defence of this action at the trial thereof;

"(5) And it is further ordered that the fact that the said General Security Insurance Company of Canada is a party or a third party to this action shall not be disclosed to the jury, if any, trying this action;

"(6) And it is further ordered that the third party shall not apply to strike out any jury notice which may be filed and

served upon the third party by the plaintiffs within the proper time for the trial of this action;

“(7) And it is further ordered that the plaintiffs shall serve notice of trial in the usual manner upon the third party or its solicitors and that the record shall consist of the statement of claim, the statement of defence of the third party and the plaintiffs’ reply and joinder of issue, if any, together with a copy of this order;

“(8) And it is further ordered that the plaintiffs shall not note the pleadings closed as against the defendant for default of appearance or defence by the defendant herein and shall not sign judgment against the defendant for default of appearance or defence by the defendant herein;

“(9) And it is further ordered that the costs of this application shall be paid by the third party to the plaintiffs in any event of the cause.”

2. Order of McFarland J., dated December 29th, 1941:

“1. Upon the application made on the 12th day of December, 1941, by counsel for the plaintiffs by way of appeal from the order of O. E. Lennox, Esquire, Assistant Master, made the 2nd day of December, 1941, in presence of counsel for General Security Insurance Company of Canada; upon reading the writ of summons, the pleadings, the affidavit of J. H. Amys filed, and the said Order dated December 2nd, 1941, and upon hearing what was alleged by counsel and judgment having been reserved, the said application coming on this day for judgment.

“2. It is ordered that the said appeal be, and the same is hereby allowed, and that the said Order of the said Assistant Master be varied, and as varied be as follows:

““(1) It is ordered that General Security Insurance Company of Canada be added as a third party in this action under the provisions of s. 205(7) of the Insurance Act, R.S.O. 1937, c. 256, and be bound by the findings between the plaintiffs and the defendant at the trial of this action.

““(2) And it is further ordered that the costs of this application shall be paid by the third party to the plaintiffs in any event of the cause.’

“3. And it is further ordered that the costs of this application be costs in the cause.”

February 3rd, 1942. The appeal was heard by RIDDELL, HENDERSON and MCTAGUE JJ.A.

J. L. G. Keogh, for the third party, appellant. The order of the Assistant Master was right, and should be restored. It is a logical extension of the practice under s. 205(7), as first laid down in *Marshall v. Adamson*, [1936] O.R. 103, 3 I.L.R. 159, [1936] 1 D.L.R. 635, which has been accepted and broadened in such cases as *McDermid v. Bowen*, 51 B.C.R. 401, [1937] 1 W.W.R. 548, 4 I.L.R. 215, and *Obradovich v. Proulx* (1940), 54 B.C.R. 465, 7 I.L.R. 144.

The insurance company, having repudiated liability to the defendant, cannot defend this action on his behalf without waiving its rights, except by means of these third party proceedings: *Dufferin Paving & Construction Co. v. Can. Surety Co.* (1935), 2 I.L.R. 525; *England v. Dom. of Can. Gen. Ins. Co.*, [1931] O.R. 264, [1931] 3 D.L.R. 489, affirmed 40 O.W.N. 508. The order of McFarland J. places the company in a position in which it is bound by the judgment in the action, and may be absolutely liable under s. 205(1), but has no right to take any part in the action, and this is contrary to natural justice: *Windsor v. Chalcraft*, [1939] 1 K.B. 279, [1938] 2 All E.R. 750; *Jacques v. Harrison* (1864), 12 Q.B.D. 165; *McLean v. McLean*, [1939] O.W.N. 222, 306; *Christie v. Toronto* (1893), 15 P.R. 415; Rule 169.

R. L. Kellock, K.C., for the plaintiffs, respondents. The order of the Assistant Master goes far beyond what was decided in *Marshall v. Adamson*, *supra*, and contains provisions which are not authorized by s. 205(7), and which have the effect of depriving the plaintiffs of rights to which they are entitled under the Rules. Para. 8 of the order deprives the plaintiffs of their right to note the pleadings closed and to set the action down for assessment of damages, under Rules 38 and 354-5. The same objection applies to para. 2. Para. 4 is not authorized by the statute, and in view of the defendant's default there should be no trial, but only an assessment of damages. Para. 7 is improper in so far as it deals with the record. The plaintiffs have no objection to paras. 3, 5 and 6.

The Assistant Master has misinterpreted the effect of s. 205(7), which merely provides that "where an insurer denies liability . . . it shall have the right . . . to be made a third party". Had the Legislature intended to put the insurer

in the place of the defendant for all purposes of the action, it would have said so expressly. To construe the section in this way is not to interpret the language of the statute but to legislate. *Thompson v. Goold & Co.*, [1910] A.C. 409, 79 L.J.K.B. 905, at p. 911. The insurer is entitled, under Statutory Condition 4, to defend the action in the name of the insured, or, under the rule in *Jacques v. Harrison* (1864), 12 Q.B.D. 165, to defend it in its own name: *Windsor v. Chalcraft*, [1939] 1 K.B. 279, [1938] 2 All E.R. 750. Even if, in doing so, it might waive some right as against its insured, this is not sufficient ground for reading into the statute language which is not there. An insurer could very simply provide against any such waiver in its policy.

Further, the governing language in s-s. 7 is "where an insurer denies liability", and the subsection is intended to provide an expeditious way for determining the question of liability, as between insurer and insured, in the main action.

Cur. adv. vult.

February 13th, 1942. RIDDELL J.A.:—The plaintiff brought an action for damages arising from an automobile accident; the defendant did not defend—the Insurance Company, having issued a policy of insurance to the defendant, but claiming that it did not cover the case, applied under the Insurance Act, R.S.O. 1937, c. 256, s. 205(7), to be made a third party. An order was made by the Assistant Master, which was set aside in great part by Mr. Justice McFarland. By leave given by Mr. Justice Mackay, an appeal is now taken to this Court.

It being a simple action in tort between the plaintiff and the defendant, it is obvious that the third party has no right to be brought in or to interfere at common law, but that all the right it can claim must be depended upon the statute. And it is equally clear that we sit, not to declare the law as we think it should be, but only as it has been laid down by the Legislature—we are not a Court of morals but a Court of law.

I had examined the provisions of the statute and the numerous cases cited to us by counsel; and I had formed an opinion in the matter when the judgment of my learned brother McTague was brought to me. As I concur with this judgment in every respect, I do not think it necessary to express my views in full.

The judgment sets out in full the proceedings, and they do not call for repetition.

I concur in the judgment of Mr. Justice McTague and would dismiss the appeal with costs.

HENDERSON J.A. agreed with MCTAGUE J.A.

MCTAGUE J.A.:—This is an appeal by leave of Mackay J., from an order of McFarland J., dated the 29th day of December, 1941, allowing an appeal from the order of the Assistant Master in Chambers adding the Insurance Company as third party under the authority of s. 205(7) of The Insurance Act, R.S.O. 1937, c. 256. The order of McFarland J. has not the effect of formally setting aside the learned Assistant Master's order, but of varying it to an extent that from point of view of the Insurance Company such is the real result.

To make the matter clear I set out the provisions of the orders of the Assistant Master, and of McFarland J. [see *supra*].

According to the statement of claim the plaintiffs claim damages for injuries sustained as the result of an automobile accident caused, as they say, by the negligence of the defendant. It is alleged that the defendant is a resident of Hull, Quebec. Apparently the defendant has elected not to defend in this jurisdiction and has not entered an appearance. The Insurance Company has purported to insure the defendant against liability for loss to persons or property. For certain reasons unknown to this Court it denies liability under its policies.

In these circumstances the Insurance Company made application to the Assistant Master to be added as a third party under s. 205, s-s. 7 of the Insurance Act, which reads as follows:

"Where an insurer denies liability under a motor vehicle liability policy it shall have the right upon application to the court to be made a third party in any action to which the insured is a party and in which a claim is made by any party to the action for which it is or might be asserted indemnity is provided by the said policy."

It will be remembered that s-s. 1 of the same section, originally passed in 1932, provides:

"Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the

insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied."

And the insurer liable to pay under s-s. 1 was given relief against the insured by what is now s-s. 6 of the same s. 205.

"The insured shall be liable to pay or reimburse the insurer, upon demand, any amount which the insurer has paid by reason of the provisions of this section which it would not otherwise be liable to pay."

It was not until 1935 that s-s. 7, purporting to provide a species of third party relief, was passed.

Subsection 7 of s. 205, while using the term "third party" was so contrary to the general practice of adding third parties under the Rules that it presented quite a problem as regards practice. It was a departure from the well established former practice that only a defendant had the right to ask the Court to add a third party. Mr. Justice Middleton first dealt with it in *Marshall v. Adamson*, [1936] O.R. 103, 3 I.L.R. 159, [1936] 1 D.L.R. 635. He took the position that in the circumstances of that case it was the duty of the Court by its procedure to give effect to the intention of the Legislature as determined from the wording of the subsection. Accordingly he went to the pains and trouble of laying down the procedure he thought could be applied, and even dealt in some detail with the terms of the order. It must be kept in mind, however, that *Marshall v. Adamson* was a defended action; there was a defendant who was actually defending, and there was a third party taking part in the action along with the defendant. It must also be kept in mind that one of the basic principles considered by Mr. Justice Middleton was that the plaintiff would be in no way prejudiced by the order which he made. He says so expressly at page 106 of the report.

In this case the circumstances are quite different. The defendant has elected not to appear. Once that has happened the plaintiff has certain rights under the Rules of Practice, and therefore under the Judicature Act. The effect of the learned Assistant Master's order is to abrogate those rights (note paragraph 8). I should think that the authority to abrogate

those rights should be clear and unambiguous in the legislation before such an order can properly be made. In addition to that the order of the learned Assistant Master in reality gives the Insurance Company the right to defend in the name and place of the defendant—which is a far cry from giving it the right to participate as a third party, unless the term “third party” is to be construed as giving that right.

Counsel for the Insurance Company argues very ably that the order of the Assistant Master is a logical extension of the practice under s. 205(7) of the Insurance Act, as laid down in *Marshall v. Adamson*. In my view the question is not so much whether it is logical, but rather whether the subsection, or the Act, provides for it. The Court cannot in its effort to be logical venture into the field of legislation. *Thompson v. Goold & Co.*, [1910] A.C. 409, the judgment of Lord Mersey at p. 420. See also *Rex v. Excise Commrs.*, [1928] A.C. 402, at p. 409, where Viscount Dunedin in the House of Lords referred to the *stern warnings* that had been given in the cases and, “to those who in order to read in words into a statute which are not there, or to divert words used from their ordinary and natural meaning, permitted themselves to speculate as to what the aim and attainment of the Act was likely to be.”

In my consideration of the case I can see no good reason for giving to s. 205(7) the meaning which must be imported into it, if one is to sustain the order of the Assistant Master. *Marshall v. Adamson* is amply supported by the subsection, but the order in the case at bar, while it may look logical, could only be based upon reading into the subsection or the Act something which is not there. In circumstances like the present I do not think any order is justified under s. 205(7). Accordingly the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the third party, appellant: Hughes, Agar & Thompson, Toronto.

Solicitors for the plaintiffs, respondents: Mason, Foulds, Davidson & Kellock, Toronto.

[COURT OF APPEAL.]

Duff and Fleming v. McBride.

Trials—Ordering New Trial—After-discovered Evidence—Necessity for Showing Due Diligence and that New Evidence Practically Conclusive—Award of Damages Indicating Compromise or Arrangement by Jury.

An appellant will be able to obtain an order for a new trial on the ground of newly discovered evidence only if he shows that due diligence was exercised before the trial and that the new evidence will be practically conclusive. *Rathbone v. Michael* (1910), 20 O.L.R. 503; *Varette v. Sainsbury*, [1928] S.C.R. 72, [1928] 1 D.L.R. 273, applied. Where, however, the jury's award of damages strongly suggests that it was arrived at as the result of some compromise, or an attempt on the jury's part to apportion damages according to the respective degrees of negligence of the parties, the verdict will be set aside, and the plaintiff will be entitled to a new trial, at least as to the assessment of damages. *King v. Goodman*, [1940] S.C.R. 541, referred to.

AN appeal by the plaintiffs from the judgment of His Honour Judge Macdonell, in the County Court of the County of York, entered upon the findings of the jury in an action for personal injuries sustained by the plaintiffs when they were struck by the defendant's automobile.

The following statement of facts is taken from the judgment of Middleton J.A.:

An appeal by the plaintiffs from the judgment of His Honour Judge Macdonell upon the findings of a jury in favour of the plaintiffs for the sum of \$1,353.75 for the plaintiff Duff and \$406.75 for the plaintiff Fleming, and costs upon the County Court scale. The plaintiffs were found responsible for 66 per cent. of the damages and the defendant for 34 per cent., and the judgment is for \$460.28 and \$138.30 respectively.

The action was brought by the plaintiffs by reason of an accident which happened upon a highway in the City of Toronto near the intersection of Fulton Avenue and Jackman Avenue. The plaintiffs were injured by reason of a collision with the defendant's motor car at a time when they were about to cross the highway. The defendant's car hit the two pedestrians on the street and they were seriously injured. Miss Duff was confined to the hospital as a result for six months, except a few days, and Mr. Fleming was injured and taken to his house, and, while less seriously injured than Miss Duff, he suffered much pain.

Miss Duff's special damages were \$1,177.75, and Mr. Fleming's were \$366.75. The verdict of the jury gave Miss Duff

\$1,353.75 including special damages, and Mr. Fleming \$406.75 including special damages.

February 5th and 6th, 1942. The appeal was heard by MIDDLETON, MASTEN and McTAGUE JJ.A.

R. S. Mills, for the plaintiffs, appellants. No objection was made at the trial to any of the amounts proved as special damages, but the jury awarded to the plaintiff Duff only \$175.00 above her special damages, and to the plaintiff Fleming only \$40.00 more than his disbursements. It is submitted that such an award shows either that the jury totally failed to appreciate the evidence submitted or that they reached a compromise verdict. *Doan v. Neff* (1916), 38 O.L.R. 216; *Vanhorn v. Verral* (1912), 3 O.W.N. 1567. The plaintiffs accordingly ask either larger damages or a new trial as to damages.

The plaintiffs also ask for a new trial as to liability, on the ground, *inter alia*, that they have discovered since the trial two additional witnesses, whose evidence directly contradicts that of the defendant in important particulars. It is submitted that the case comes within the rules laid down as to newly discovered evidence in *Varette v. Sainsbury*, [1928] S.C.R. 72, at p. 76, [1928] 1 D.L.R. 273.

Hon. F. J. Hughes, K.C., for the defendant, respondent. The defendant cannot ask this Court to dismiss the action in view of the *onus* section of the Highway Traffic Act, R.S.O. 1937, c. 288, and the decision in *Newell v. Acme Farmers Dairy Ltd.*, [1939] O.R. 36, [1939] 1 D.L.R. 51. He therefore simply asks that the appeal be dismissed with costs. The facts fully justified the jury's findings as to negligence on the part of the plaintiffs. After a careful charge, the jury gave the plaintiffs some damages when, on the evidence, they might well have given them nothing, and their verdict should not be disturbed. *Warren v. Gray Goose Stage Ltd.*, [1938] S.C.R. 52, 47 C.R.C. 214, [1938] 1 D.L.R. 104.

Cur. adv. vult.

February 13th, 1942. MIDDLETON J.A. (after stating the facts as above):—Miss Duff and Mr. Fleming both appeal to this Court and move to allow certain evidence to be given by John William Young and Eleanor Ann Young as shown in the affidavit filed.

We do not think that the evidence which is foreshadowed by the affidavits can be given. The evidence is that of two persons who were not present at the time the accident happened. They were upon the scene afterwards, and desire to testify as to the happening of the accident with the view of allocating the blame.

The evidence shows that a motor car, namely, that occupied by the witnesses (the Youngs) was at the scene of the accident shortly after it occurred. No doubt the plaintiffs were unaware of this car and the evidence that could be obtained from the occupants; but we think that the facts were known, and the parties ought to have secured the evidence of these witnesses at the trial.

The principles upon which a new trial is granted are discussed in *Merchants' Bank v. Lucas* (1887), 13 O.R. 520 [reversed on other grounds, 15 O.A.R. 573, 18 S.C.R. 704] and are further laid down in *Rathbone v. Michael* (1910), 20 O.L.R. 503. I refer particularly to what is said by Mr. Justice Osler at p. 507:

"There is no doubt that the rule which governs the admission of new or further evidence is rightly fenced round with strict limitations. The parties should come to the trial prepared with the evidence upon the issues to be tried; and to open the door wide to enable them to make good a case defectively presented would lead to abuses such as the prolonging of litigation and opportunities for fraud. In *Dinsmore v. Shackleton* (1876), 26 C.P. 604 (C.A.); *Murray v. Canada Central R.W. Co.*, 7 A.R. 646, and *Trumble v. Hortin*, 22 A.R. 51, this Court has spoken on the subject with no uncertain sound, and the practice has been more recently stated in such cases as *Turnbull v. Duval*, [1902] A.C. 429, and *Young v. Kershaw*, 81 L.T.R. 531 (C.A.). There must have been, as is said in the last case, no remissness in adducing all possible evidence at the trial, and, 'as to the class of evidence, it must be such that if adduced it would be practically conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different.' Merely corroborative evidence, evidence to admit which would be merely setting oath against oath, evidence obtained under suspicious circumstances, or evidence which might enable an opponent's witness to be cross-examined more effectively, will not do. It must, as a rule, be 'of some fact or

document essential to the case, of the existence or authenticity of which there is no reasonable doubt, or no room for serious dispute:' per Spragge C.J.O., in *Murray v. Canada Central R.W. Co.*, 7 A.R. 646, at p. 655."

This, no doubt, actuated the judgment of the Supreme Court in *Varett v. Sainsbury*, [1928] S.C.R. 72, [1928] 1 D.L.R. 273. There it was said that it must be shown not only that due diligence had been exercised before the trial but that the evidence was practically conclusive.

The plaintiffs seek here to have the finding of the jury increased. We do not think that is a course which this Court can adopt, nor can the verdict be regarded as satisfactory. We think that it must be taken to be the result of some compromise or arrangement among the jurors. They were asked at the trial if the verdict represented the whole amount of the damages sustained, and they stated that it did. In addition to this they found that the plaintiffs were responsible for 66 per cent. of the damage sustained and the defendant was liable for 34 per cent., and they find that the damage was confined to the extremely modest figures given. The defendant paid into Court as covering the loss sustained by the two plaintiffs, the sum of \$1,600.00 in satisfaction of Miss Duff's claim and \$500.00 in satisfaction of Mr. Fleming's claim. These figures were unknown to the jury but they are in marked contrast to the view taken by them, and we think the jury's award cannot be allowed to stand, and there must be a new trial, at any rate so far as concerns the amount of damages sustained.

We think the defendant is put to his election as to whether he will take a new trial or desires a new assessment of damages only. If the damages only are to be assessed, the evidence to be taken at the new trial must necessarily be confined to that which is relevant to the question of damages. If, on the other hand, a new trial is had upon the whole issue of liability, the plaintiffs will be at liberty to call any evidence in support of the claim. The defendant must elect within 10 days from the delivery of this judgment as to which course he desires should be followed, and the order will then be accordingly. The parties consent to the new trial being had before a Judge alone and the order will so provide.

The costs of the former trial and of the motion before us will be in the cause, save that the costs of the application to admit the new evidence will be to the defendant in any event.

We trust that the parties may see the wisdom of making some settlement of this litigation. The defendant can well afford to pay something more than has been awarded as the result of what appears to be an unfortunate accident occasioned to these plaintiffs.

If the defendant was liable for only the amount found by the jury, it is hard to see how the award of costs can stand in view of the payment into Court.

MASTEN J.A. agreed with MIDDLETON J.A.

McTAGUE J.A.:—This is an appeal by the plaintiffs from the judgment of His Honour Judge Macdonell in the County Court of the County of York upon the findings of a jury.

The plaintiffs are asking for a new trial upon three grounds: First, that the amount of damages found by the jury is manifestly inadequate; second, that the trial was unsatisfactory otherwise; and third, upon the ground that new evidence has been discovered since the trial.

The facts are sufficiently set forth in the reasons of my brother Middleton. I have only a few brief observations to add.

Regarding the second ground upon which a new trial is sought, I can find nothing in the evidence regarding the conduct of the trial which would justify our granting what is asked. The learned trial Judge's charge to the jury is, as usual, fair, painstaking, and careful, and nothing else which occurred in the proceedings can be said fairly to have prejudiced the plaintiffs' case.

During the argument I ventured the view that the appellants had a very difficult task before them to establish their right to a new trial in an action in negligence on the ground of after-discovered evidence. I think this is especially true in a case of this particular type where the plaintiff can go to trial relying on the *onus* section in the Highway Traffic Act. To create a precedent by granting what the plaintiffs ask here, on the ground of after-discovered evidence, would open the door wide to never-ending litigation between the same litigants and grossly offend against the maxim *interest reipublicae ut sit finis litium*. After all, the discretion to grant a new trial is a judicial discre-

tion, not to be exercised arbitrarily; and a litigant who has obtained a judgment is entitled not to be deprived of it without very solid grounds. *Brown v. Dean*, [1910] A.C. 373, 79 L.J.K.B. 690. At any rate in this particular case, applying the rule laid down in the cases referred to by my brother Middleton, and I make special reference to *Varette v. Sainsbury*, [1928] S.C.R. 72, [1928] 1 D.L.R. 273, I am by no means satisfied that the new evidence sought to be introduced could not have been obtained before the trial if reasonable diligence had been exercised. Further, I find myself unable to say that it is practically conclusive evidence in my understanding of the meaning of the word "conclusive". In my view the appeal on this ground fails completely.

On the question of the jury's finding as to damages, I think the appeal should succeed. Mr. Hughes suggests that the jury in awarding a mere pittance above out-of-pocket expenses was really granting a premium to the plaintiffs. That is hardly consistent with the jury's finding that the defendant was 34 per cent. negligent. We, I think, can hardly uphold the principle that a jury has any right to tamper with the result by varying the amount of damages in accordance with the degree of negligence of which each party is considered guilty. Whether this is what the jury did in this case, of course, I do not know. But I do agree with my brother Middleton that the amount of damages found is on the evidence here highly indicative of a compromise of some kind. I refer to *King v. Goodman*, [1940] S.C.R. 541.

There should be a new trial limited to damages unless the defendant elects to have a new trial of the whole matter, as my brother Middleton suggests. In view of the offer of appellants' counsel in Court, the defendant may have such new trial before a Judge without a jury if he so desires. I concur also in my brother Middleton's disposition of the costs.

Appeal allowed and new trial ordered; costs of former trial and of appeal, with one exception, in the cause.

Solicitors for the plaintiffs, appellants: Mills & Mills, Toronto.

Solicitors for the defendant, respondent: Hughes, Agar & Thompson, Toronto.

[MAKINS J.]

**The Township of Stamford v. The Public Utilities Commission
of the Township of Stamford.**

Public Utilities—Municipal Ownership—Powers of Municipal Public Utility Commission—Surplus Moneys—Rights of Municipality to Recover—The Public Utilities Act, R.S.O. 1937, c. 286, ss. 31, 36(4), 42, 44.

While a municipal public utility commission is entitled to provide for expenses and maintenance before remitting surplus moneys to the municipality, it is not entitled, without the municipality's consent, to retain all the surplus for the purpose of installing a meter system. Where, however, the municipality has stood by and made no objection to the improper expenditure of considerable sums of money by the commission, it is precluded by its own conduct from recovering these amounts. *Macdougall, Sons & Co. v. Windsor Water Comms.* (1901), 31 S.C.R. 326; *Humphreys v. London*, [1935] O.R. 91, applied; *Re Goderich Collegiate Institute Board and Goderich*, [1934] O.W.N. 515, distinguished.

THE plaintiff township sued the defendant commission, which was established under the Public Utilities Act, R.S.O. 1937, c. 286, claiming payment over to it of surplus moneys realized by the commission from the operation of a system of municipal waterworks in the township. The statement of claim alleged that in the years 1923 to 1939 inclusive the commission had received revenue which exceeded expenditures by \$44,591.14, and that it had paid over to the township only \$5,985.46, in spite of repeated demands, and that the commission now proposed, in spite of a resolution to the contrary passed by the municipal council, to spend approximately \$15,000 for the purchase and installation of water meters in the township. The plaintiff's prayer was for an injunction restraining the purchase and installation of these meters, and payment of the sum of \$42,756.79.

The commission, in its defence, pleaded that it was an independent corporate entity, specially designed to manage and operate the public utilities of the corporation free from the control and management of the municipality, and that this action was an attempt to interfere with it in such management. It further pleaded that no moneys were owed by it to the township until the latter had, through its auditors, determined the excess of the commission's revenues over its disbursements, and given directions to pay over such excess, as required by s. 44 of the Public Utilities Act, neither of which statutory duties had been performed by the township. An amendment to this defence was permitted at the trial, as appears by the judgment.

The action was tried by MAKINS J., without a jury, at Welland.

W. S. Martin, K.C., for the plaintiff.

R. B. Law, K.C., for the defendant.

January 10th, 1941. MAKINS J.:—The plaintiff township is suing the Public Utility Commission of the Township of Stamford for surplus moneys accumulated in the waterworks systems operated by the defendant in the said township.

The defendant is a commission created under and by virtue of the Public Utilities Act, R.S.O. 1937, c. 286, and it is alleged that the defendant has failed from time to time to pay over to the said township surplus moneys according to the provisions of the said Act.

The defendant asked to be allowed to amend its defence by pleading laches and that the plaintiff stood by and watched and condoned the spending of large sums out of surplus funds for a dwelling house, stand pipe and well. I am of opinion that this defence is well taken so far as past expenditures are concerned, and that the plaintiff is estopped as to them.

It is admitted that the defendant had a surplus on hand at the end of 1939 of some \$19,940.16, payment over of which the plaintiff has demanded and the defendant has refused because it says that it wants to instal a water meter system which will take all of this surplus.

S. 31 of the Act provides that revenues arising from supplying a public utility, after providing for expenses and maintenance of the works, shall be paid over to the treasurer of the municipality, to be applied annually to the reduction of rates, etc. S. 36(4) of the Act says—"Nothing contained in this section shall divest the council of its authority with reference to providing the money required for such works, and the treasurer of the municipality shall, upon the certificate of the commission, pay out any money so provided".

S. 42 provides for the commission delivering to the council an annual statement.

Then s. 44 says—"The revenues, after deducting disbursements, shall, quarterly or oftener if the council so directs be paid over to the treasurer of the municipality, and shall be by him placed to the credit of the account of the public utility work, and

if not required for the purpose of the work shall form part of the general funds of the corporation.”

It seems to me plain that while the commission has a discretion and power in maintaining and operating the waterworks system, what they now propose in installing water meters and the expenditure of some twenty thousand dollars is beyond the power and competence of the commission without the plaintiff's consent, and the council strongly objects.

The commission is merely the statutory agent in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, if not authorized by a by-law of the council, and involving an expenditure which would exceed the statutory limit, would not be a binding contract. *Macdougall, Sons & Co. v. Windsor Water Commrs.* (1901), 31 S.C.R. 326; *Humphreys v. London*, [1935] O.R. 91, [1935] 3 D.L.R. 39.

The defence cites *Re Goderich Collegiate Institute Board and Goderich*, [1934] O.W.N. 515. What the school board asked for there was clearly within the board's competence. The town of Goderich by an indirect method sought to force the board to reduce the teachers' salaries by holding up the board's estimate, filed with the town clerk.

I am therefore of opinion that the plaintiffs should succeed as to the surplus demanded from the defendant, namely, \$19,940.16, less working capital, which a witness who should know placed at \$4,000, making \$15,940.16.

There will be an injunction restraining the defendant from expending the above surplus in the purchase of water meters, and a mandatory order that it pay over \$15,940.16 to the plaintiff. If there is any other surplus upon which the parties cannot agree there may be a reference to the Local Master at Welland to ascertain it.

The plaintiffs should have their costs of the action.

Judgment accordingly.

Solicitors for the plaintiff: Martin & Calvert, Niagara Falls.

Solicitors for the defendant: Raymond, Spencer & Law, Welland.

[COURT OF APPEAL.]

Cavana et al. v. The Township of Tisdale et al.

Assessment and Taxation—Mineral Rights—Severance of Mineral and Surface Rights—Non-assessability of Mining Rights after Severance—The Assessment Act, R.S.O. 1937, c. 272, s. 39(4) and (10).

If an owner of mineral land transfers the surface rights, reserving to himself the mining rights, his interest thereafter is not assessable, and any assessment of the land, and any proceedings to tax it or to enforce payment of the taxes by sale of the land, are invalid so far as the mining rights are concerned, and will be set aside as to those rights. *Township of Bucke v. Macrae Mining Co. Ltd.*, [1927] S.C.R. 403, [1927] 3 D.L.R. 1, applied.

AN appeal by the defendants from the judgment of Roach J. in favour of the plaintiffs in an action to set aside a tax sale of lands in which the plaintiff Tisdale owned the mining rights. The facts appear in the judgments.

The action was tried by ROACH J., without a jury, at Cochrane.

R. L. Kellock, K.C., for the plaintiffs.

H. E. Manning, K.C., and *T. R. Langdon*, for the defendants.

April 30th, 1941. ROACH J.:—This is an action respecting a tax sale by the defendant corporation to the defendant Lang of certain lands in the Township of Tisdale in July, 1940. The defendant Murphy is the Clerk and Treasurer of the defendant corporation. The lands in question are recorded in the Register of Land Titles at Cochrane, Ontario.

By a transfer dated January 9, 1909, recorded in the Office of Land Titles on December 11, 1909, the plaintiff Cavana, as trustee, became the registered owner of lands therein described as follows:—"the north part of broken Lot Number One, in the fifth concession of the said Township of Tisdale, containing by admeasurement one hundred and fifty-six acres more or less, being all that part of said lot lying north of a line drawn across said lot parallel with the south limit thereof, and distant thirty-nine chains, twelve links north therefrom."

By transfer dated December 30, 1930, and recorded on February 12, 1931, the plaintiff Cavana transferred to Charles David Ferguson "the surface rights" of the said lands.

By a lease dated June 1, 1934, and recorded on October 1, 1934, Cavana leased to Horace Austin Bingham, since deceased, "all mines, minerals, mining rights and quarries which are now or hereafter may be found in, under, throughout or upon" the

said lands, and three other parcels, for the term of ninety-nine years, for the consideration therein set out.

In the years 1930 and 1931, according to the assessment roll of the municipality for each of those years, the lands, therein described as N. $\frac{1}{2}$ lot 1, con. 5, were assessed to Cavana, who was therein described in the appropriate column as a non-resident, at the sum of \$4,000.00.

In the assessment roll for 1932 the lands are similarly described and assessed at \$4,000.00 but in the column used for the name of the taxable person appears the name Charles D. Ferguson, whose address is given in the address column as Orillia, Ontario. Under this address and in the address column appear the words "also A. G. Cavana, Orillia" and on a line with these words and in the column headed "occupation, in the case of females", appear the words "mining rights."

In the assessment roll for each of the years 1933 and 1934 the lands, similarly described, are assessed at \$4,000.00, and in the column used for the name of the taxable person is the name Charles D. Ferguson, whose address is given in the address column as Orillia, Ontario. Then under this address and in the address column appear the words "A. G. Cavana, Orillia", and in the occupation column are the words "Cavana mining rights."

Then in the assessment roll for 1935 the lands, similarly described, are again assessed at \$4,000.00 and in the name column again there is the name Chas. D. Ferguson and his address is again shown in the address column as Orillia, Ont. Under this address and again in the address column is the name, A. G. Cavana, but unlike the roll for the previous three years, the words "mining rights" do not appear anywhere.

Then in each of the years 1936 to 1939 the lands, similarly described, are assessed at \$4,000.00 to Chas. D. Ferguson and the name of the plaintiff Cavana does not again appear.

Then the collectors' rolls for each of the years 1930 to 1939 were, of course, made up from the assessment rolls for each of those years with the name Charles D. Ferguson, A. G. Cavana and the words "mining rights" or "Cavana mining rights" in similar columns to the columns in which they appeared in the assessment rolls.

There were no taxes paid in respect of these lands, or any interests therein, for the years 1932 to 1938, both inclusive. The

plaintiffs claim that during those years there were two estates in those lands, the one an estate in the surface rights vested in Ferguson, the other an estate in the mining rights vested in Cavana, subject to the lease in favour of Bingham; that the municipality could in those years assess only the surface rights because the mining rights were exempt from assessment, after the severance of the two estates, by s. 39(4) of The Assessment Act, R.S.O. 1937, c. 272 (formerly s. 40(4) in the 1927 Revision). If the plaintiffs' contention is correct, then any purported sale of the mining rights based on an alleged default in payment of taxes levied or assessed in respect of mining rights would be a nullity. The plaintiffs go further and say that in fact during those years the municipality assessed only the surface rights and that quite apart from the question of alleged irregularities in the tax sale proceedings the municipality could in any event sell only the surface rights at a tax sale. That contention necessitates consideration of two questions:—

First—Could the municipality assess mining rights?

Second—If it could, did it?

Before considering either of these questions it should be stated that the municipality purported to sell not only an account of arrears for the year 1932 and subsequently, but also on account of arrears for earlier years. It is appropriate to this contention to postpone the consideration of these two questions and first examine into the matter of the alleged earlier arrears.

It will be remembered that the transfer to Ferguson of the surface rights was dated December 30, 1930. The lands were assessed to Cavana in 1930 and the taxes for that year amounted to \$332.60. In 1931 they were again assessed to Cavana and the assessment notice was sent to him on April 17th of that year. It is a curious coincidence that in a registered letter bearing that same date, viz., April 17th, addressed to the Clerk of the Township of Tisdale, but posted by Cavana at Orillia on April 20th, Cavana stated as follows:—

"I hereby notify you that I am not the owner of lands assessed in my name in the Township of Tisdale, viz.—N. $\frac{1}{2}$ lot 1, Concession 5 Tisdale". The municipality treated this as an appeal by Cavana against the assessment. A Court of Revision was held on June 10, 1931. Cavana did not appear nor was he represented, and the assessment was confirmed. Some doubt

was raised as to whether or not notice of the sitting of the Court of Revision was sent to Cavana but I think the evidence reasonably justified the conclusion that it was sent, and I so find.

The taxes for the year 1931 amounted to \$331.00 and were not paid.

In an action in the District Court of the District of Cochrane, commenced on December 8, 1931, the Municipal Corporation of the Township of Tisdale sued both Cavana and Ferguson for arrears of taxes totalling \$713.41 made up as follows:—

Taxes assessed and levied for the year 1930.....	\$332.60
Percentage added for non-payment before May 1, 1931	33.26
Taxes assessed and levied for the year 1931.....	331.00
Penalty added for non-payment pursuant to section 111 of The Assessment Act	16.55
<hr/>	
Total.....	\$713.41

The pleadings in that action are important by reason of its termination and by reason of what it is now alleged by the plaintiff is the legal result of such termination.

In the statement of claim the plaintiff corporation alleged that Cavana "was the owner of the surface and mining rights of" the said lands; that by transfer dated December 30, 1930, and registered on February 12, 1931, Cavana "transferred the surface rights of the said lands" to Ferguson; that Cavana "had been and still is the owner of the mining rights of the said lands" and that the defendants were liable for the payment of the taxes totalling \$713.41. The plaintiff then claimed payment of these taxes and "a special lien upon the lands in respect thereof as provided by section 97 of The Assessment Act" and the costs of the action.

In his statement of defence, Cavana pleaded that Ferguson had in fact been the owner of the surface rights since early in 1930 although the transfer by him to Ferguson was dated December 30, 1930; that he appealed against the 1931 assessment and did not receive the statutory notice of the trial of his complaint before the Court of Revision; that since the sale of the surface rights to Ferguson he was the owner of the mining rights only, and that the mining rights are exempt from taxation pursuant to The Assessment Act; that the assessment notices were defective in that they did not distinguish between surface

rights and mining rights, and for the reasons alleged he asked that the action be dismissed as against him.

While that action was pending certain correspondence passed between the solicitors representing the corporation and Cavana respectively, the relevant parts of which for the purposes of the present action are as follows:—

First—a letter from Cavana's solicitor saying in part “. . . I am going to suggest a compromise settlement at one half of the amount of your claim which will be sufficient to take care of the year 1930.”

Second—a letter, in reply, to Cavana's solicitor reading in part as follows:—“. . . We are satisfied to accept your suggestion as to settlement but only on condition that we be allowed the tariff costs for our fees and disbursements,” amounting to \$56.91.

Following this correspondence, Cavana's solicitors paid to the corporation's solicitors on May 30, 1932, \$413.62, \$356.71 being half of the claim and \$56.91 being costs. This amount was accepted by the corporation's solicitors and they forwarded to Cavana's solicitor a notice of discontinuance. This notice was not filed as an exhibit in the present action and I am unable to determine from the correspondence whether that action was wholly discontinued or only discontinued as against Cavana. It would at least be the latter.

In view of the foregoing the plaintiffs plead that the defendant corporation is concluded from founding the tax sale on an allegation of arrears of taxes for the years 1930 and 1931. The pleading of the defendant corporation in answer thereto has simplified the issue raised by the plaintiffs. That pleading is as follows:—

“The action and claim of the Corporation of the Township of Tisdale referred to . . . was not settled in full but on the contrary the said corporation accepted from the said Allan G. Cavana, the sum of \$413.62 in settlement of its claim as against the said Allan G. Cavana only and the said action was discontinued as to the said Allan G. Cavana only. The said corporation in effecting such settlement with the said Allan G. Cavana did not relinquish in any way its special lien upon the lands hereinbefore described for the remainder of its claim. The remainder of the taxes for the years 1930 and 1931 including

penalties have never been paid and they still constitute a lien upon the said lands."

Having admitted that the settlement was sufficiently extensive to relieve Cavana from personal liability for the balance of the taxes for those years how can the corporation be heard to say that it still retained a lien on his interest in the lands for such balance? In determining the scope and effect of the settlement one must not lose sight of the claims being made in the litigation thus settled. In that litigation the corporation, by its prayer, sought payment and a special lien on the lands. Those, surely, were the matters which were settled and in the settlement the corporation did not reserve its lien. The effect of the settlement was to release Cavana and any lien which the corporation had by virtue of the statute on Cavana's interest in the lands.

The next question to be considered is this, viz.: Was Cavana's interest in the lands after 1931, that is the mining rights, assessable?

The relevant provisions in The Assessment Act, R.S.O. 1937, c. 272, are as follows:—

S. 39(4). "The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable."

S.-s. 10. "Where any estate in mines, minerals or mining rights has heretofore or may hereafter become severed from the estate in the surface rights of the same lands, whether by reason of the original patent or lease from the Crown, or by any act of the patentee or lessee, his heirs, executors, administrators, successors or assigns, such estates after being so severed shall thereafter be and remain for all purposes of taxation and assessment separate estates notwithstanding the circumstances that the titles to such estates may thereafter be or become vested in one owner."

Subsection 8 has no application here.

In *Township of Bucke v. MacRae Mining Co. Ltd.*, [1927] S.C.R. 403, [1927] 3 D.L.R. 1, there were two separate Crown grants, one of the mines, minerals and mining rights in certain land, and the other of that land without mines and minerals. These respective estates became vested in the one owner. The

Township of Bucke sold the lands for arrears of taxes and in that action the question as to the right of the municipality to assess the mining rights arose. The Court held that the mining rights as such were not assessable for municipal taxes, but that ownership of the separate estates having become vested in the same corporation there could be valid assessments of the land containing and including the minerals. At p. 409, Mignault J. says:—

“Minerals, as such, that is to say minerals considered as a subject of ownership distinct from the ownership of the land in which they are contained, are not assessable”.

It is significant that The Assessment Act was amended the following year by adding what is now subsection 10 of section 39.

It is admitted in the pleading of the defendant corporation that these lands are “mineral lands” and the evidence verifies it. The estate of Cavana in these lands after the severance was therefore exempt from assessment. Indeed after 1931 the corporation did not assess that estate. The corporation in its pleading states that during the years 1932 to 1939 inclusive the lands were assessed to Ferguson only. The assessment rolls for the years 1932 to 1935 inclusive indicate a recognition that Cavana was the owner of the mining rights only. The description of the lands in the assessment roll would be sufficient to include the mining rights, but the reference therein to Cavana’s mining rights would indicate that the estate assessed to Ferguson was only the surface rights.

The municipal corporation having no power to assess the mining rights in the said lands it follows that the tax sale in so far as it was alleged to be founded on arrears of taxes assessed or levied on that estate is a nullity.

The description in the warrant authorizing the sale and in the certificate issued to the defendant Lang is sufficient to include the mining rights. In the circumstances on this branch of the case there should be judgment for the plaintiffs,

(1) declaring that the tax sale by the defendant corporation or its treasurer the defendant Murphy or any officer or agent of the corporation to the defendant Lang in so far as it included, or was, or is, alleged to have included, the estate or interest of the plaintiffs in the said lands, is illegal and void;

(2) vacating and removing from the Register in the Land Titles office at Cochrane the caution registered by the defendant

Lang against the said lands, the same being identified as bearing date the 23rd day of April, 1940, and registered on the 22nd day of December, 1940, against Parcel No. 818 for Sudbury North Division as No. 36626;

(3) for an injunction restraining the defendant corporation and the defendant Murphy, its treasurer, and any other officer or officers of the corporation from conveying or purporting to convey to the defendant Lang the estate or interest of the plaintiffs in the said lands.

The plaintiffs attack the tax sale on the further ground that certain statutory requirements as to procedure, respecting tax sales, were not complied with. In view of what I have already stated it is unnecessary to consider these additional matters.

There is a further branch to this case. In February 1941 prior to the institution of this action, the plaintiff Cavana paid to the defendant corporation the sum of \$100.00 under protest. This amount was made up of the balance of 1930 taxes which the corporation claimed was still unsatisfied, together with penalties and certain expenses in connection with the tax sale. At the time of such payment the defendant corporation through its officers was insisting that those alleged arrears were still owing and that, quite apart from the alleged arrears for subsequent years, the tax sale could be and was founded on the arrears for that year. The plaintiff Cavana now seeks to recover that sum. I see no reason why he should not.

In addition to the other relief awarded the plaintiffs, the plaintiff Cavana shall have judgment against the defendant corporation for the sum of \$100.00.

The plaintiffs shall have their costs of this action to be taxed.

October 20th, 21st and 22nd, 1941. The appeal was heard by ROBERTSON C.J.O. and MASTEN and HENDERSON JJ.A.

H. E. Manning, K.C., for the defendants, appellants. The plaintiff Cavana was the owner of the lands in question until the end of 1930, when he transferred the surface rights to one Ferguson, for a nominal consideration of \$1.00, in order to avoid taxation. He appealed against his assessment for 1931, and it was confirmed by the Court of Revision, and therefore stands as a good assessment. He did not, as a non-resident, ask to have the

property assessed to him, under s. 36(6) of The Assessment Act, R.S.O. 1937, c. 272 (s. 37(6) in R.S.O. 1927, c. 238), and therefore could not have been sued personally for the taxes: *Municipality of Berlin v. Grange* (1856), 1 E. & A. 279.

The tax sale was properly conducted, and the usual and proper advertisement was given, and the defendant Lang therefore received a good title. This action was not brought within the time prescribed by s. 178(2) of The Assessment Act.

Cavana's interest in the land was properly taxable. The only exception under The Assessment Act is for minerals, under s. 39(4); mineral lands are not excepted: *Township of Bucke v. Macrae Mining Co. Ltd.*, [1927] S.C.R. 403 at 411; *Re Hollinger Consol. Gold Mines Ltd. and Township of Tisdale*, [1931] O.R. 640 at 644. Exemptions from taxation must be strictly construed: *Les Commissaires v. Montreal* (1886), 12 S.C.R. 45 at 54; *Income Tax Commrs. v. Pemsel*, [1891] A.C. 531 at 551; *Montreal v. Collège Ste. Marie*, [1921] 1 A.C. 288 at 290; *Metropolitan Ry. Co. v. Fowler*, [1893] A.C. 416 at 427.

The distinction between "mines" and "mineral lands" is clearly drawn in *Township of Tisdale v. Hollinger Consol. Gold Mines Ltd.*, [1933] S.C.R. 321 at 326. Very substantial rights come within the term "mining rights": see The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 15; *Coniagas Mines Ltd. v. Town of Cobalt* (1910), 20 O.L.R. 622 at 638. No distinction is made between mining rights and rights under a fee simple in s. 14 of The Mining Tax Act, R.S.O. 1937, c. 28. There is no reason to think that the Legislature intended a different rule under The Assessment Act. The assessment of plaintiff Cavana is of mining rights apart from the minerals. Cavana had a right to use the surface to work the minerals, and might have exhausted it, and therefore there is no part of the property which does not come within the definition of "mineral land". The Legislature, in enacting s. 39(10), did not provide that estates in mining rights should be exempt. If there is any irregularity in the assessment roll, the Act provides for amendment. The words "mining rights" in the address column must mean that mining rights were to be assessed; the township assessed the property and not the person.

The plaintiffs are estopped from denying the assessment, since any defects could have been corrected on appeal: The Assessment Act, ss. 74, 87; *Vivian & Co. v. Township of McKim*

(1892), 23 O.R. 561 at 565, 571; *Great Western Ry. Co. v. Rogers* (1869), 29 U.C.Q.B. 245 at 252 (which stated the law now embodied in s. 87); *C. & E. Townsites Ltd. v. City of Wetaskiwin* (1919), 59 S.C.R. 578 at 591. Cavana should have appealed against the assessment, and, not having done so, he cannot now say that he was not assessed. He cannot complain of want of notice, since he did not request that his name be put on the roll as a non-resident: *Excelsior Mining Co. v. Lohead* (1915), 35 O.L.R. 154 at 159.

The settlement of the action in 1931 did not release the lien, since there was no mention of it, and a release is only effective to the extent of the precise thing released: *Solly v. Forbes* (1820), 2 Br. & B. 38; *L. & S. W. Ry. Co. v. Blackmore* (1870), L.R. 4 H.L. 610 at 623. The action was discontinued, not dismissed.

The tax sale, not having been attacked within one year, has been validated by s. 185 of The Assessment Act: *Langdon v. Holtvrex Gold Mines Ltd.*, [1937] S.C.R. 334; *Excelsior Mining Co. v. Lohead* (1915), 35 O.L.R. 154 at 161; *Lahey v. Town of Dundas*, [1939] O.R. 361; *McConnell v. Beatty*, [1908] A.C. 82; *Millar v. Patterson* (1915), 7 O.W.N. 714.

R. L. Kellock, K.C., for the plaintiffs, respondents. The settlement of the action in 1931 extinguished the lien. It was a settlement without reservation, and at that time Cavana was assessed for both surface and mining rights. A municipality may settle claims for taxes and lose its statutory lien: *Town of Sturgeon Falls v. Imperial Land Co.* (1914), 31 O.L.R. 62 at 71, 72; The Mercantile Law Amendment Act, R.S.O. 1937, c. 178, s. 16; *Bank of Africa v. Salisbury Gold Mining Co.* (1892), 61 L.J.P.C. 34 at 36; *Deschenes v. Loveys*, [1936] 3 D.L.R. 210; Manning, Assessment and Rating, 2nd ed., p. 413; *Norfolk v. Roberts* (1913), 28 O.L.R. 593 at 603-5; 50 S.C.R. 283 at 291-3.

Cavana's mining rights were not assessable: The Assessment Act, s. 39(4), (5). "Minerals" in s.-s. 4 and "mineral rights" in s.-s. 8 are synonymous: *Macrae Mining Co. Ltd. v. Township of Bucke* (1926), 58 O.L.R. 453 at 460-5, affirmed, *Township of Bucke v. Macrae Mining Co. Ltd.*, [1927] S.C.R. 403 at 408. Minerals owned as such are not assessable: s. 39(4); land containing minerals is assessed as land, under s. 39(5), and

income from mines is assessed under s. 39(6). It was held in the *Bucke* case, *supra*, that since the mining and surface rights were in one person, the assessment was sufficient. S.-s. 10 was enacted after this case, on the theory that mining rights as such are not assessable.

Whether or not land is mineral land is a question of fact: *Township of Tisdale v. Hollinger Consol. Gold Mines Ltd.*, [1933] S.C.R. 321 at 325.

If Cavana was to be assessed, his name should have been put on the roll in the proper manner: *C. & E. Townsites Ltd. v. City of Wetaskiwin* (1919), 59 S.C.R. 578 at 602; *City of North Bay v. Gordon*, [1934] O.R. 376 at 380. He was not assessed as a non-resident under s. 24(1)(j). The township could sell Ferguson's interest, but never even assessed Cavana's mining rights, which were a separate estate. The same description of the property was used after the transfer to Ferguson, although the township knew of the severance of estates. After 1935, no notice of assessment was sent to Cavana.

Since there was no assessment, there could be no taxes upon which a sale could be based: *Fleming v. McNabb* (1883), 8 O.A.R. 656; Manning, *op. cit.*, pp. 514-5; *Blakey v. Smith* (1910), 20 O.L.R. 279 at 283; *Barnwell Consol. School District v. Can. Western Natural Gas etc. Co.* (1922), 69 D.L.R. 401 at 423. There was no necessity for Cavana to appeal against the attempt to assess and tax him: Manning, *op. cit.*, p. 237; *City of Ottawa v. Wilson*, [1933] O.R. 21; *Becker v. City of Toronto*, [1933] O.R. 843.

As to the tax sale—Cavana's name did not appear on the list provided for by s. 149(1), and it is not listed in the advertisement published in The Ontario Gazette: see The Assessment Amendment Act, 1939, c. 3, s. 12. S. 170 of The Assessment Act provides for a certificate to the purchaser, and this certificate states that the treasurer sold "all the right, title and interest of the present owner", who, according to the roll and the tax sale lists, was Ferguson. By s. 181, the tax deed is "of the estate or interest sold", and this must refer to Ferguson's interest. Since there is in fact no tax deed, s. 185 does not bar this action.

Notice to the owner that lands are liable to be sold for taxes is a condition precedent to a valid sale: ss. 126, 135, 185; *Standard Trusts Co. v. Municipality of Hiram*, [1927] S.C.R. 50 at 55-58; *Langdon v. Holtyrex Gold Mines Ltd.*, [1937] S.C.R.

334 at 336 and 339; *Dalziel v. Mallory* (1888), 17 O.R. 80 at 83, 85.

No list was prepared, as required by ss. 134 and 148, and the preparation of this list is imperative: *Carter v. Hunter* (1907), 13 O.L.R. 310 at 319. There was no authentication, as required by s. 149, and compliance with this section also is a condition precedent to a valid sale: *O'Brien v. Cogswell* (1889), 17 S.C.R. 420 at 424, 425.

The cases of *Vivian & Co. v. Township of McKim*, *supra*, and *Great Western Ry. Co. v. Rogers*, *supra*, are distinguishable, in that there the assessments were good in fact. The *onus* is on the defendants to show that taxes were in arrear for which the land might rightly be sold: *Hislop v. Joss* (1901), 3 O.L.R. 281.

H. E. Manning, K.C., in reply. Some of the cases cited on the other side are distinguishable: *Standard Trusts Co. v. Municipality of Hiram*, *supra*, on the difference in the wording of the statutes considered; *Becker v. City of Toronto*, *supra*, on the ground that the decision there was based upon a finding that there was no taxable property; *City of North Bay v. Gordon*, *supra*, on the ground that the validity of the assessment was not considered; and *C. & E. Townsites Ltd. v. City of Wetaskiwin*, *supra*, on the wording of the statute in question. The remarks in the *Township of Bucke* case, *supra*, as to the assessment of minerals, must be considered *obiter*, since it was not necessary for the decision to determine whether or not they would have been taxable if owned separately.

Cur. adv. vult.

November 27th, 1941. ROBERTSON C.J.O.:—This is an appeal by the defendants in the action from the judgment of Roach J. dated 30th April, 1941, after the trial of the action before him at Cochrane.

The action arises out of the sale for taxes of certain mineral lands in the Township of Tisdale, composed of the north half of Lot 1, Con. 5. The broad question is whether, as a result of the sale, the minerals and mining rights were vested in the purchaser. The learned trial judge held that they did not pass to the purchaser.

Cavana, the first-named plaintiff, was for many years the owner of the whole parcel, including the minerals, but in 1930

he transferred the surface rights to one Ferguson, retaining ownership of only the minerals and mining rights. The other plaintiff, William Griffiths Bingham, is the executor of Horace A. Bingham, now deceased, to whom, in his lifetime, Cavana had leased the "mines, minerals and mining rights." The defendants are the Township, the Township Treasurer, and the purchaser at the tax-sale.

The patent for these lands when granted by the Crown did not reserve the minerals or mining rights. Cavana acquired title to the lands as patented by transfer in 1909. The lands are unoccupied, and so far as appears, they have never been occupied, and there are no buildings on them. It is admitted that they are "mineral lands". Presumably Cavana was holding the lands in the expectation of the extension into their neighbourhood of important mining operations carried on in other parts of the Township of Tisdale, when these lands might come into the market. There were, however, annual taxes to pay. While, by the Assessment Act, the minerals in, on or under mineral land are not assessable, that Act also provides that "in no case shall mineral land be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes" (R.S.O. 1937, c. 272, s. 39(5)). This parcel of mineral land was assessed at \$4,000. The taxes upon it for the year 1930 were \$332.60.

No doubt for the purpose of getting relief from these annual taxes, Cavana decided to unburden himself of the ownership of the land, reserving only the mining rights. In 1927 it had been said by the Supreme Court of Canada in *Township of Bucke v. Macrae Mining Co. Ltd.*, [1927] S.C.R. 403, [1927] 3 D.L.R. 1, that minerals and mining rights as such are not assessable, and that they are severable in ownership from the "surface rights". While the actual decision in that case was that the ownership of both "surface rights" and "mining rights" having vested in the same corporation, there could be a valid assessment of the land containing and including the minerals, and that a transfer of the land pursuant to a sale for taxes based on such an assessment carried with it the minerals in and beneath the land, it is plain that the decision and the reversal of the judgment of the Court of Appeal (1926), 58 O.L.R. 453, were based upon the unity of ownership that succeeded a prior severed ownership.

Following this judgment the Legislature, in 1928, enacted what is now s. 39(10) of the Assessment Act, as follows:

"(10) Where any estate in mines, minerals or mining rights has heretofore or may hereafter become severed from the estate in the surface rights of the same lands, whether by means of the original patent or lease from the Crown, or by any act of the patentee or lessee, his heirs, executors, administrators, successors or assigns, such estates after being so severed shall thereafter be and remain for all purposes of taxation and assessment separate estates notwithstanding the circumstances that the titles to such estates may thereafter be or become vested in one owner."

Acting apparently upon advice that if he rid himself of the surface rights and retained ownership only of the mining rights he would have no taxes to pay to the Township until there was an assessable income from a mine or mineral work upon the land, Cavana, by transfer dated 30th December, 1930, in consideration of \$1.00, transferred the surface rights to Ferguson, a resident, like himself, of Orillia. Cavana retained no interest in or control over the surface rights and plainly Ferguson set no value upon them. He paid no taxes in any of the succeeding years and the lands remained unoccupied. It was suggested in argument, but somewhat vaguely, that Cavana could not get rid of the liability to taxation by this process, designed for that purpose alone. I do not know why an owner cannot rid himself of property that, in his estimation, is not worth the taxes annually levied upon it, if he can find a way to do it effectively, and with the ownership disappears any liability for future taxes. (See *Levene v. Inland Revenue Commrs.*, [1928] A.C. 217, at p. 227 per Lord Sumner).

Before dealing with the effect of the severance of the mining rights from the surface rights, in so far as future taxation is concerned, another situation must be cleared up. At the time of this severance the taxes for the year 1930 were in arrear. They were a charge upon the land, including the minerals, according to the decision of the Supreme Court of Canada already referred to. In 1931 the land was assessed in the same way as in 1930, and Cavana was assessed as owner. Having received notice of this assessment Cavana, by letter to the Township Clerk, dated 17th April 1931, gave notice that he was not the owner of the land assessed in his name. The Township

Clerk treated this as an appeal from assessment, and brought it as such before the Court of Revision, which dismissed the appeal. Taxes to the amount of \$331 were levied for the year 1931 upon this assessment. On receiving from the Township a notice of these taxes Cavana wrote again to say that he was not the owner of the lands, and that Ferguson was the owner. In December 1931 the Township brought action in the District Court against both Cavana and Ferguson for the taxes for the two years 1930 and 1931, to which was added for each a percentage or penalty for non-payment, making a total claim of \$713.41, besides costs of suit. A lien upon the lands for the taxes was also claimed. In May 1932, pursuant to an arrangement, Cavana paid the sum of \$413.62, which included \$56.91 for costs of action, and the action was discontinued as against him. The learned trial judge considered that the effect of what was then done was to release Cavana and to discharge any lien which the Corporation had on Cavana's interest in the lands. On the argument of the appeal counsel for respondents contended—as I think he was bound to contend to support, consistently with other contentions of counsel, the conclusion of the learned trial judge—that the sum paid by Cavana was paid and was accepted as in satisfaction of the taxes for both 1930 and 1931, and wholly discharged the taxes in arrear for all purposes.

I am unable to accept in its entirety this contention as to the effect of the settlement made by Cavana. As it appears to me the sum that Cavana paid was to be applied in payment of the taxes for 1930 in full, and they were discharged, and in consideration of that payment the Township released Cavana from all personal liability for the taxes in arrear. Cavana was firmly of the opinion that after 1930 the mining rights could not be taxed, and there was no payment of the 1931 taxes, nor any discharge in respect of them except as against Cavana personally. However, in my opinion that does not affect the result in the present action, and without pausing now to discuss further the effect of the settlement of the former action, I shall proceed to consider the situation in relation to the taxes for 1931, which I think were not paid nor otherwise discharged.

Stating my conclusion first, it is in brief that in view of the exemption of "mining rights" from assessment by s.-s. 4 of s. 39 (then s. 40) of the Assessment Act, as that subsection was interpreted by the Supreme Court of Canada in the *Township of*

Bucke case, *supra*, and in view of the effect, for purposes of taxation and assessment, given by s.-s. 10 of s. 39 (enacted in 1928 following upon the decision in the *Township of Bucke* case) to the severance in ownership of "mining rights" from "surface rights," there was not, and lawfully there could not be, an assessment of the mining rights reserved by Cavana at any time after he had transferred the surface rights to Ferguson in December 1930. Neither were they, after the severance of ownership, included in the land containing the minerals for the purpose of taxation or assessment.

According to the meaning given to the expression "surface rights" in instruments executed on or after 1st July 1914, other than conveyances by the Crown, by sections 16, 17 and 18 of the Conveyancing and Law of Property Act, R.S.O. 1937, c. 152 (formerly R.S.O. 1927, c. 137) a grant or reservation of surface rights, unless the contrary appears to be the intent of the instrument, shall be construed to convey or reserve the land therein described with the exception of the ores, mines and minerals on or under such land, and such right of access for the purpose of winning the ores, mines and minerals as is incidental to a grant of ores, mines and minerals.

"Mining rights" are defined by s. 15 of the same Act in terms identical with the exception made in the definition of "surface rights". The "mining rights" are, as already stated, exempt from assessment by virtue of s. 39(4) of the Assessment Act. It is true it is "minerals" and not "mining rights" that are mentioned in that subsection, but in the *Township of Bucke* case the Supreme Court of Canada treated the terms as identical, no doubt having regard to the fact that on a grant or reservation of minerals a right of access to recover the minerals is implied. Even if the right of access which is excepted with the minerals in the statutory definition of "surface rights" is regarded as being in itself an interest in land, it is not an interest that is assessable under the Assessment Act. It is an easement appurtenant to the minerals which are reserved as part of the land itself, and not as a mere *profit à prendre* (see Vol. 22 Halsbury, 2nd ed., p. 551 and Armour on Real Property, 2nd ed., p. 47). An easement is not assessable independently, but only in connection with and as part of the land to which it is appurtenant (s. 14(1) of the Assessment Act, enacted in 1930 by 20 Geo. V, c. 46, s. 4, and before that statute see *Essery v. Bell* (1909),

18 O.L.R. 76; *A. J. Reach Co. v. Crosland* (1918), 43 O.L.R. 209 and 635, 45 D.L.R. 140; *Travers v. Price* (1926), 59 O.L.R. 323, [1926] 4 D.L.R. 223). The easement here being appurtenant to the minerals which are exempt from assessment, is likewise exempt.

That the "surface rights" and the "mining rights" when severed become separate and distinct hereditaments was plainly stated in the judgment of the Supreme Court of Canada in the *Township of Bucke* case, and now s. 39(10) of the Assessment Act declares that "after being so severed they shall thereafter be and remain for all purposes of taxation and assessment separate estates." The word "estates" used in the statute may not be quite apt, for the Assessment Act does not provide for the assessment of separate estates in land as that term is commonly used, but the meaning and intention of the statute is, I think, sufficiently plain. The intention was, so far as assessment and taxation are concerned, to give statutory effect to the view expressed by Masten J.A., speaking for the majority of the judges of the Court of Appeal in the *Township of Bucke* case, that when the ownership of the mines or minerals has been severed from the ownership of the surface rights, there are two separate entities (or, as it was expressed in the judgment of the Supreme Court, two separate hereditaments), and that they shall continue to be so considered in spite of any later unity of ownership.

When, therefore, after the transfer of the surface rights to Ferguson, an assessment was entered in the assessment roll for 1931, in the same terms as the assessments for 1930 and earlier years, its effect was not the same. It was not an assessment of the minerals or of the mining rights, but it never had been, for they were not assessable. In that sense there was no difference. What is important is that the land assessed in 1930 was, in the words of the Supreme Court of Canada in the *Township of Bucke* case, "the land containing and including the minerals," so that on the sale of it for non-payment of taxes the minerals passed with it. In 1931 by reason of the severance in ownership and of the statute, the land assessed was, for purposes of taxation and assessment, no longer "the land containing and including the minerals." The land assessed and the non-assessable mining rights were, for these purposes, separate the one from the other. To assess the land or to impose taxes upon it did not affect the

mining rights. That, in my opinion, is the plain result of the application of s. 39(10) to the circumstance of this case.

Cavana was not prevented from taking this position by the dismissal of his appeal from the Court of Revision in 1931, if in fact there was such an appeal. The objection he raised by his letter of 17th April 1931 was only to the entry of his name as owner of the land assessed. It had no relation to an assessment of the mining rights for there was no assessment of the mining rights, nor could there be any.

It is not necessary to discuss the assessments and taxes of the years after 1931. What I have said in regard to the year 1931 applies equally to the later years. In my opinion the mining rights were not assessed, and there were no arrears of taxes in respect of them at any time after the payment of the taxes for 1930. The mining rights were, therefore, not included in, nor did they pass by the tax-sale.

As there was much discussion on the argument with respect to the settlement of the action brought by the Township in 1931 against Cavana and Ferguson for the taxes for 1930 and 1931, I should state, briefly, the reasons for my view of it.

It is essential to remember the position definitely and purposely taken by Cavana. His position was that after 1930 the "mining rights" were not taxable. This was not put forward as a mere talking point—a makeweight for use in the discussion of compromise. It was in reliance upon the soundness of that position that he made the transfer of the surface rights to Ferguson, and that he had determined to pay no taxes in future. The 1930 taxes he was liable for personally, and under s. 99 (then s. 97) of the Assessment Act they were a charge upon the land, including the minerals, for there had then been no severance. The letter that Cavana's solicitor wrote the Township solicitors on May 18th, 1932 "to suggest a compromise settlement at one-half of the amount of your claim which will be sufficient to take care of the year 1930", must be read with this in mind. It was on the basis of this letter and without further elaboration of the terms of settlement, except to insist upon payment of the costs, that the action was discontinued as against Cavana. I am quite unable to find in what was done any intention to relieve Ferguson or his lands from anything that Ferguson ought to discharge. The taxes for 1930 Cavana wanted paid in full, and

I think that was his express proposal, and it was the taxes for 1930 only that he paid.

In the result the appeal should be dismissed with costs.

MASTEN J.A.:—Having had the privilege of reading the reasons for judgment of my Lord the Chief Justice I agree with his conclusion and, broadly speaking, with his reasons and observations. More specifically, I desire to emphasize my concurrence in the view which he has so clearly demonstrated, that Cavana's mining rights (minerals plus an easement for winning them) became unassessable at the moment when they were severed from the surface rights, namely, on December 30th, 1930.

But I cannot attribute importance to the motives inducing respondents' settlement of appellants' action for \$713.41 being taxes claimed for the years 1930 and 1931. That action was settled and discontinued against Cavana on payment by him of \$413.62.

I am unable to apprehend the idea that a lien on Cavana's mining rights could continue after the total amount of the taxes claimed against him had been settled and paid in full. There cannot be a lien for a non-existent claim. *Ex nihilo nihil fit*.

For this reason it seems to me immaterial to inquire into the mental processes of Cavana and his adviser when entering into the settlement above mentioned.

The action is to set aside a tax sale so far as it affects Cavana's mining rights. The action succeeds because the appellant township had no existing lien on Cavana's mining interests when it purported to sell and convey them.

HENDERSON J.A.:—An appeal from the judgment of the Honourable Mr. Justice Roach dated April 30th, 1941.

The judgment declares that "no part of the taxes for the years 1930 and 1931 in respect of the lands in the pleadings mentioned, was owing or outstanding at the date of the tax sale in the pleadings mentioned, and doth order and adjudge the same accordingly." With this finding I agree.

It appears that the plaintiff Cavana was assessed as a freehold owner of the north half of lot 1 in concession 5 of the Township of Tisdale, for the years 1930 and 1931, as a non-resident, and that taxes for these years became due in the sum of \$713.41.

An action was brought in the District Court of the District of Cochrane by the Township against Cavana and one Charles

David Ferguson, in which the plaintiff claimed payment of the taxes amounting to \$713.41, and interest from the date of the issue of the writ, and a special lien upon the lands in respect thereof, as provided by section 97 of The Assessment Act. To this claim Cavana set up various defences, and on May 18th, 1932, Cavana through his solicitor wrote to the solicitors for the Township in part as follows:

"In view of the fact that it is such a long trip to Cochrane from here, and that there may be some doubt as to Cavana's ability to successfully defend the whole amount of your claim, I am going to suggest a compromise settlement at one-half of the amount of your claim which will be sufficient to take care of the year 1930

"It seems to me under the circumstances that the Township would be well advised to accept this offer as it will cost them almost as much as half the amount claimed to fight the matter."

To this the Township's solicitors replied on May 26th, as follows:

"Referring to your letter of the 18th instant, we are satisfied to accept your suggestion as to settlement but only on condition that we be allowed the tariff costs for our fees and disbursements herein. This would amount to \$56.91.

"We are enclosing herewith our bill of costs in this matter. Accordingly, if you will let us have your cheque for \$413.62, being \$356.71 for half of the claim and \$56.91 for costs.

"If we do not hear from you by return of mail we are making preparations to proceed with the trial."

In reply to this, Cavana's solicitor sent his marked cheque for \$413.62, and requested that the Township's solicitors make the necessary arrangements to have the action withdrawn, and forward him notice of discontinuance. The Township's solicitors accepted the money and served a notice of discontinuance of the action as against the defendant Allan G. Cavana. It appears that the defendant Ferguson did not enter any defence, and so far as appears, nothing further was done in the action as against him.

I agree with the learned trial judge that this was a settlement of the taxes for 1930 and 1931. I do not entertain any doubt as to the power of the Township Council to compromise the action and in my opinion any entries that should have been made upon the Collector's Rolls to show that the taxes for 1930

and 1931 had been paid, should have been made by the Township authorities and no obligation rested upon the plaintiff Cavana in that regard. It appears to me that the Township cannot be heard to assert any outstanding claim for taxes for these two years.

What occurred in the year 1932 and subsequent years is fully detailed in the reasons for judgment of the learned trial judge. The formal judgment further declares "that the estates or interests of the plaintiffs in the lands in the pleadings mentioned were not assessable and were not assessed by the defendant Corporation on and after the 1st day of January, 1931, and doth order and adjudge the same accordingly."

I am in agreement with this declaration.

Since writing the above I have had the privilege of reading the opinion of my Lord the Chief Justice and I concur in his opinion and in the reasons therefor, except as to the matter of the settlement of the taxes for 1930 and 1931, as to which I have expressed my views in the foregoing pages.

I therefore agree that the appeal be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, respondents: Mason Foulds Carter & Kellock, Toronto.

Solicitors for the defendant township and the defendant Murphy: Langdon & Langdon, South Porcupine.

Solicitors for the defendant Lang: Lang & Michener, Toronto.

[COURT OF APPEAL.]

Rex v. Hayes and Pallante.

Criminal Law—Charge of Theft and Conspiracy to Steal—Trial Judge Acquitting of Theft but Convicting of Conspiracy—No Evidence of Conspiracy Apart from Evidence of Theft—No Power on Appeal to Substitute Conviction for Attempt to Steal—The Criminal Code, R.S.C. 1927, c. 36, s. 1016(2).

The accused were tried upon a formal charge containing two counts, one for theft and one for conspiracy to steal. The trial judge found the evidence insufficient to justify a conviction for theft, but convicted on the count for conspiracy. On appeal, the Court was of opinion that while the evidence might have justified a conviction for attempt to steal, although the trial judge did not so find, there was no evidence, apart from that of an attempt, to support the charge of conspiracy. *Held*, the conviction must be quashed. There was no power, under s. 1016(2) of The Criminal Code, to substitute a conviction for an attempt to steal, since the acquittal on the charge of theft was, by implication and by the operation of s. 949, an acquittal also of the attempt, and there was no appeal against this acquittal.

AN appeal by two accused from their conviction for conspiracy to commit the indictable offence of theft. The facts appear in the judgment of the Court.

February 16th, 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and FISHER J.J.A.

G. A. Martin, for the accused, appellants, referred, in addition to the cases cited in the judgment, to *R. v. Cameron* (1901), 4 C.C.C. 385; *Maudsley's Case* (1830), 1 Lew. C.C. 51; Roscoe's Criminal Evidence, 15th ed., p. 535; 1 Russell on Crimes, 8th ed., p. 197. He also raised certain technical objections to the count for conspiracy, and cited authorities in connection therewith.

W. B. Common, K.C., for the Crown, respondent, referred to s. 1016(2) of The Criminal Code, R.S.C. 1927, c. 36, and to *R. v. Smith* (1923), 17 Cr. App. R. 133, and *R. v. Sam Chin*, 36 B.C.R. 397, 45 C.C.C. 291, [1926] 2 D.L.R. 287.

Cur. adv. vult.

February 18th, 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the conviction of the two appellants on the 13th January 1942, by Judge Parker, sitting in the County Court Judges' Criminal Court of the County of York, of the offence of having, at the City of Toronto, in the month of September in the year 1941, agreed and conspired together to commit the indictable offence of theft, contrary to the Criminal Code.

Another count of having, at the City of Toronto, in the month of September in the year 1941, stolen the sum of \$45.00 in money, the property of George Bell, was joined with the foregoing charge, and the two counts were tried together. The accused were acquitted on the charge of stealing.

The only evidence given in support of the charge of conspiring to commit theft was the evidence by which the Crown endeavoured to make out the charge of stealing. The trial Judge held that there was not sufficient evidence to convict the accused on the charge of stealing, and objection is made that it follows that the charge of conspiracy likewise was not made out.

One George Bell, an officer in the Royal Canadian Air Force, arrived in Toronto on September 13th, 1941, and registered at the King Edward Hotel, where he was assigned a room on the fourth floor. Quite early in the morning of the 14th September, being awakened by some slight noise in his room, he saw two men move away from a chair on which he had placed some of his clothes, and go out of the room, leaving the door open. Looking into the hall, he saw the direction they had taken and quickly got on a few of his clothes and followed them. He overtook the appellant, Hayes, just beginning to go up the stairs to the floor above. Bell took hold of Hayes and asked him if he had taken his money, and Hayes said he had not. Bell had noticed that his money was gone when he partially dressed. After a little scuffle he got Hayes into the elevator and took him down to the night clerk's desk and asked the clerk to telephone for the police. On the arrival of the police Bell handed his prisoner over to them and made his accusation. Hayes still protested that he had not taken the money.

In the meantime a call had come down from the ninth floor of the hotel for the key of a room on that floor that Hayes had taken about two hours before. The police and Bell then went up to the ninth floor and found the appellant Pallante outside the door of Hayes' room. Bell says that Pallante was dressed in a manner that answered the description he had already given the police of the second man who had been in his room a few minutes before. When Hayes and Pallante were searched no such sum as \$45.00 was found upon them.

As already stated, the trial judge held that there was not sufficient evidence to convict either of the accused on the charge

of stealing \$45.00. Possibly he was influenced by the facts that Bell could not be certain that he had locked the door of his room before retiring, although that was his habit, and that the missing money was not found on the accused when searched. He accepted the evidence of Bell that both these men were in his room and that they were at the chair where his clothing was hanging. One is inclined to think that if the learned trial judge had found both the accused guilty of attempting to steal, as he might have done under the charge of stealing, it might have been difficult to set aside that conviction on the ground that there was not sufficient evidence to support it. However, that is not the matter with which we have to deal. This is not an appeal from the judgment of acquittal on the second count and it stands unchallenged.

The learned trial judge having found the evidence insufficient to warrant a conviction under the second count, I fail to see upon what evidence he based a conviction of conspiring to steal. If the accused were not shown to have been either stealing or attempting to steal, it would appear to be mere surmising to say that they had a common purpose to steal. If the evidence does not establish that they were stealing or attempting to steal, then there is no evidence that they had agreed that they would steal. One's sympathy is not in the least aroused for these accused, but the laying of a charge of conspiracy with a charge of actually committing the crime that was the object of the alleged conspiracy, where there is no evidence of the conspiracy except the evidence relied upon to show that the crime was in fact committed by the two or more persons charged, is not a practice to be followed in other than exceptional circumstances. See *Reg. v. Taylor and Smith* (1871), 25 L.T. 75; *Rex v. Goodfellow* (1906), 11 O.L.R. 359, 10 C.C.C. 424. We are of the opinion that in the circumstances the evidence having been found insufficient to support a conviction on the second count, it follows that there was insufficient evidence to support the charge of conspiracy.

It was submitted, however, by counsel for the Crown that this Court should apply s. 1016(2) of the Criminal Code, and should substitute for the conviction for conspiring to steal, a conviction for an attempt to steal. We think it is impossible to do this. If there were facts established that would warrant it, the trial judge might have found the accused guilty of an

attempt to steal on the count charging that they stole Bell's money. S. 949 of the Criminal Code. Instead of doing that the trial Judge acquitted the accused on that count. S. 1016(2) is as follows:

"2. Where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could on the indictment have found him guilty of some other offence, and on the actual finding it appears to the court of appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the court of appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law for that other offence, not being a sentence of greater severity."

In order that we should act upon this sub-section and find the appellants guilty of attempting to steal, it is necessary that it should appear on the actual finding of the trial judge that he must have been satisfied of facts which proved the accused guilty of that other offence. Here, if the trial judge had been satisfied of facts that proved the accused guilty of an attempt to steal, his natural course was to convict them of it under the second count. The only finding actually made on that count, however, was one of "not guilty". See *Rex v. Evans* (1916), 16 Cr. App. R. 8; *Rex v. Fisher* (1921), 16 Cr. App. R. 53.

In my opinion, therefore, it is impossible to apply the provisions of s. 1016(2) and to substitute a verdict of "guilty" of any other offence of which, on the indictment, the accused could have been found guilty. To do so would be in effect to reverse the finding of "not guilty" on the second count, from which there is no appeal.

Certain objections to the form of the indictment in so far as the first count is concerned were made, but it is not necessary to pass upon them.

The appeal must be allowed and the conviction quashed.

Appeal allowed and conviction quashed.

Solicitor for the accused Hayes, appellant: G. A. Martin, Toronto.

Solicitor for the accused Pallante, appellant: T. B. Horkins, Toronto.

Solicitor for the Crown, respondent: W. B. Common, Toronto.

[COURT OF APPEAL.]

Rex v. Fialka.

Criminal Law—Imprisonment—Power of Court to Direct that Term Commence at Expiration of Previous Sentence—The Criminal Code, R.S.C. 1927, c. 36, s. 1055—The Prisons and Reformatories Act, R.S.C. 1927, c. 163, s. 3.

S. 3 of The Prisons and Reformatories Act clearly recognizes, if it does not grant, a power to direct that a term of imprisonment shall commence on a future day, if there is proper reason for such postponement. Where, therefore, a person who is already undergoing a term of imprisonment imposed for violation of a provincial statute, is convicted of an offence under The Criminal Code, the magistrate has power, whether or not s. 1055 of the Code is applicable, to direct that the term of imprisonment imposed for this offence shall commence at the expiration of the term which the accused is already serving.

AN appeal from an order of Urquhart J., dismissing a motion in the nature of *certiorari*. The facts sufficiently appear in the judgment.

February 16th, 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and FISHER JJ.A.

E. W. Bayly, for the appellant.

W. B. Common, K.C., for the Crown, respondent.

February 18th, 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the order of Urquhart J. dated 9th January, 1942, dismissing the application of the appellant for an order by way of *certiorari* in order that the terms of imprisonment imposed on the appellant by the Police Magistrate at Oshawa on 30th September, 1941, should be made concurrent.

The appellant was convicted on May 12th, 1941, of an offence under the Liquor Control Act, and there having been in the meantime an appeal against his conviction to the County Judge and then to the Court of Appeal, both of which were dismissed, he was sentenced on 30th September 1941 to a term of three months' imprisonment. On 15th September 1941 appellant was convicted before the same Magistrate of a later offence under the Liquor Control Act, and he came before the Magistrate to be sentenced on 30th September 1941 upon this further conviction. The Magistrate sentenced him to three months' imprisonment, to commence after the expiration of the sentence of three months awarded on the same day upon the conviction of May 12th, 1941. On 30th September 1941 appellant was convicted before

the same Magistrate on a charge of wilfully obstructing a police officer engaged in the execution of his duty, and was thereupon sentenced to imprisonment for the term of six months, this sentence to commence after the expiration of the two terms of three months' imprisonment each, above mentioned. All three terms of imprisonment were to be served in the County jail.

It is claimed for the appellant that the Magistrate could not properly postpone the commencement of the six months' term awarded for wilfully obstructing a police officer until after the expiration of the two sentences awarded under the Liquor Control Act. He bases his contentions in this regard upon the fact that the conviction for wilfully obstructing a police officer is made under the Criminal Code, while the other two convictions and the sentences imposed are under a provincial statute. It is not necessary to set out all the arguments that were advanced in support of this contention. They are substantially all based upon an assumption that a term of imprisonment must commence on the day when sentence is passed, unless there is some statutory authority for directing otherwise. It is argued that sec. 1055 of the Criminal Code does not apply because the offences referred to in it must be deemed to be offences under the Criminal Code. I do not know that that is so, and no authority was submitted for the proposition.

It is, I think, sufficient to refer to s. 3 of the Prisons and Reformatories Act, R.S.C. 1927, c. 163, which is as follows:

"The term of imprisonment in pursuance of any sentence shall, *unless otherwise directed in the sentence*, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced."

This section plainly recognizes, even if it does not grant, power to direct the postponement of the day when a term of imprisonment shall commence, when there is proper reason for such a postponement. The effect of what the appellant contends here would be that he would undergo no punishment at all for the offence under the Criminal Code, for the six months' sentence imposed, if it were to commence on the date when the sentence was imposed, would be concurrent with the two consecutive periods of three months awarded under the Liquor Control Act. We know of no law that made it illegal or improper for the

Magistrate to postpone the commencement of this sentence as he did.

The appeal is therefore dismissed. We have not considered the question of procedure by way of *certiorari* adopted in the case. The Attorney General is entitled to costs here and below.

Appeal dismissed with costs.

Solicitors for the accused, appellant: Elgie Deutch & Cumberland, Toronto.

Solicitor for the Crown, respondent: W. B. Common, Toronto.

[COURT OF APPEAL.]

Garrett v. James Richardson and Sons Ltd.

Stock and Grain Exchanges—Transactions on Margin—Terms of Contract—Right of Broker to Sell if Margin Exhausted—Whether Customer Sufficiently Advised of Term in Contract.

The defendant, as the plaintiff's broker, bought grain for future delivery, on margin. The confirmation slip sent to the plaintiff advising him of the purchase reserved to the defendant the right to close out the transaction without further notice if, in its opinion, the margin was insufficient. *Held*, although this condition was printed in small type, there was no reason to think that the plaintiff, who had had previous experience in such transactions, was not aware of it, and he was therefore not entitled to recover damages because the defendant, relying upon this right, had sold the plaintiff's grain without notice to him.

AN appeal from the judgment of Chevrier J., dismissing the plaintiff's action for damages arising out of certain transactions in grain "futures".

The defendant company, as the plaintiff's broker and on his instructions, bought 10,000 bushels of "October rye" in May, 1940. The plaintiff paid the required margin to the defendant, and also responded to two subsequent calls for additional margin. The advice note, or confirmation slip, sent to the plaintiff at the time of the sale contained the following sentence: "It is further understood that on marginal business the right is reserved to close transactions without further notice when in our opinion margins are insufficient." The price of this rye dropped on the exchange, and the defendant eventually sold the rye which it was holding for the plaintiff, without notice to him, at a price which practically wiped out the margin advanced by the plaintiff.

The plaintiff now sued, alleging that the defendant had no right to sell the grain without notice to him, and that it had advanced in price shortly after the sale, and claiming damages based upon the difference between the price at which the defendant sold and the highest price at which it might have been sold on that day.

May 19th, 20th and 21st, 1941. The action was tried by CHEVRIER J., without a jury, at Toronto.

A. R. Sproule, for the plaintiff.

J. Shirley Denison, K.C., and *G. E. Hill*, for the defendant.

September 2nd, 1941. CHEVRIER J. (after setting out the allegations contained in the pleadings and referring to certain evidence, and finding as a fact that there was no special agree-

ment between the plaintiff and an agent of the defendant that the plaintiff should be notified if additional margin was necessary to protect the account):—The whole matter resolves itself into the following questions:

1. Was there by law, as I have found there was not by agreement, any obligation on the part of the defendant, on the 18th of May, to ask the plaintiff for additional coverage? None has been submitted to me, nor have I been able to find any.

2. Does the confirmation slip, (Ex. 6), which was sent to, and received by the plaintiff on the purchase by him of the 10,000 bushels of rye, form part of that contract? I conclude it does. It stipulates the terms and conditions under which "all purchases and sales are made", and in my opinion is a vitally integral part of the contract. It is true that its tenor is in small type, but it is on the face of the slip, well in evidence, and easily readable. The plaintiff has on his own evidence dealt in stocks, grain, and futures, for some years, and is a business man of experience. I can find from the evidence no reason why he should not have known those all-important conditions and stipulations.

3. Were those conditions varied at any time by the parties or either of them? Not by the plaintiff, who says he did not know of them; not by the defendant, which invokes them.

4. The wording of Exhibit 6 is as follows: "All purchases and sales made by us for you are made in accordance with and are subject to the Rules, By-laws, Regulations and Customs of the Exchange or Market, (and its clearing house if any), where executed. This trade has been or may be cleared through the said Clearing Association and on being so cleared we will be the only person to whom you can look for the carrying out of this trade. It is also understood that actual delivery is contemplated and that the party giving the orders agrees to these terms. It is further understood that on marginal business the right is reserved to close transactions without further notice when in our opinion margins are insufficient." Witness Green, the manager of the Toronto branch of the defendants, testified that it is their custom with reference to selling out, first to try not to let the account get below the initial margin, by watching it and by asking for coverage, and that usually they have time to ask for such coverage, that it is not their practice to sell out every account when it gets below margin, and that so far as he

knows, all accounts whose margin was exhausted that morning were sold out. (Wallace Brown of the Winnipeg office testified that they do not carry overnight on less than three cents per bushel). Continuing, Green testified that when the market opened on the 18th, the plaintiff had a margin of eight cents per bushel, and that at that moment there was no reason to call on the plaintiff for more coverage, but he adds that the market broke too fast to give time to notify him; that it dropped 6 points in 6 minutes, with no sales; and that the amount of margin, after the initial ten cents per bushel, is in their discretion.

The defendants rely on the confirmation slip (Ex. 6). The plaintiff relies mainly on the authority of an American text book, Meyer's Law of Stockbrokers and Stock Exchanges. I have no hesitation in saying that it is an exhaustive work of high calibre, but it deals with stockbrokers according to United States laws, rules, etc.; the case under consideration is one dealing with the purchase of futures in Canada. I asked counsel for the plaintiff to point out any American statute, rule or regulation, upon which the decisions collected in that text book are based, and I have been shown none, nor do I know of any. But I find at page 396 of that text book the following words:

"Although the Courts rigidly protect the customer's right to a demand for margin and notice of sale [but I add that I have not been shown by reason of what principle], nevertheless, that right may be lost either (a) by agreement, or (b) by waiver . . . Such an agreement may be either written or oral, and in either case will be enforced in accordance with its term. An agreement of that character may also, in some instances, be inferred from the clauses which brokers usually print at the foot of the confirmation of execution." That is exactly what I find in the present case, in Exhibit 6.

I have given consideration to the cases cited by the plaintiff, and though great consideration must be given, as I do, to decisions of certain American Courts dealing with matters such as these, yet they fail to disturb my opinion that I am bound by the following decisions of our Canadian Courts: *Nelson v. Baird & Botterell* (1915), 25 Man. R. 244, 8 W.W.R. 144, 30 W.L.R. 822, 22 D.L.R. 132; *Maloof v. J. P. Bickell & Co.*, 59 S.C.R. 429, [1920] 1 W.W.R. 407, 50 D.L.R. 590; *Patterson v. Branson, Brown & Co. Ltd.*, 43 B.C.R. 26, [1930] 2 W.W.R.

236, [1930] 4 D.L.R. 222. In the last-named case, Murphy J., at p. 238 [W.W.R.], says:

"Plaintiff had had several dealings in wheat on margin with defendants previous to the one in question herein. On the first occasion he signed an order for purchase in which these words occur:

" 'It is further understood and agreed that on all marginal business the right is reserved to close the transactions when margins are running out without further notice. [See Ex. 8].'

"On several subsequent occasions previous to May 7 sales and purchase accounts and notices confirming orders all containing these words were sent by defendants to plaintiff in connection with his dealings with them in wheat. See Exs. 12 and 13. I hold on these facts that the plaintiff must be taken to have assented to this condition and that it must be regarded as a term of the contract between him and defendants. This question is one of fact but the manner of approaching its decision is I think found in such cases as *Watkins v. Rymill* (1883), 10 Q.B.D. 178, 52 L.J.Q.B. 121; *Parker v. S.E. Ry.* (1887), 2 C.P.D. 416, 46 L.J.C.P. 768; *Richardson Spence & Co. v. Rowntree*, [1894] A.C. 217 at 219, 63 L.J.Q.B. 283; *Thompson v. London Midland and Scottish Ry.*, [1930] 1 K.B. 41, 98 L.J.K.B. 615. The plaintiff is an educated man and must have seen the printed matter on Exs. 8, 12 and 13. He must have known from the very nature of these documents and the occasions upon which they reached him that this printed matter contained conditions relating to the terms on which his dealings with defendants would be carried on. What the defendants did was reasonably sufficient to give plaintiff notice of these conditions. They not only gave him all these printed documents but they gave him Ex. 7 which, whilst it does not in terms refer to the clause in question, gives elaborate information which should at any rate indicate to an educated man embarking on wheat speculation the desirability of not signing documents in connection therewith without reading them and of reading any printed matter appearing on documents coming to him from his brokers when such documents obviously referred to his speculations. If this view is correct then the only remaining question is: Was defendants' decision on May 8 that the margins had run so low that they were justified in selling out the plaintiff a reasonable one on the facts as they then existed? *Nelson v. Baird & Botterell* (1915), 25 Man. R. 244,

8 W.W.R. 144, 30 W.L.R. 822, 22 D.L.R. 132. The actual outcome of the sale is to my mind conclusive proof that this question must be answered affirmatively. I hold on the evidence that defendants realized upon plaintiff's securities in a proper and judicious manner and obtained for him all that could be obtained. The net result shows the plaintiff indebted to the defendants. It is urged that even if the provision as to sale without notice is held to be a term of the contract defendants were nevertheless bound to give plaintiff reasonable notice before selling and the *Nelson* case, *supra*, is cited. But as I read that case it decides not that notice must be given, but that the decision to sell must be reasonable. *Maloof v. J. P. Bickell & Co.*, 59 S.C.R. 429, [1920] 1 W.W.R. 407, 50 D.L.R. 590, particularly the judgments of Anglin and Idington JJ., seems to support this view."

I am also bound by the further decision in *Russell v. Canada West Grain Co., Ltd.*, 20 Sask. L.R. 52, [1925] 3 W.W.R. 508 (C.A.), the head-note of which is as follows:

"The defendant grain brokers held to have been justified, under their contract with the plaintiff who had purchased oats through them, in closing out his contract of purchase when, by reason of the fall of the market, the margin advanced by him became so nearly exhausted as no longer to provide adequate security to the defendants against their personal liability as brokers; and a conversation between plaintiff and defendants' agent held not to mean that the plaintiff would be protected until he would have an opportunity to put up further margin on the following day."

Under those circumstances the plaintiff has failed to establish his case, and his action is hereby dismissed with costs.

December 22nd, 1941. The appeal was heard by MIDDLETON and FISHER JJ.A. and KELLY J.

A. G. Slaght, K.C., and *A. R. Sproule*, for the plaintiff, appellant. The plaintiff had had many previous dealings with the defendant, and had been trusted to furnish margin as required. The defendant knew that the plaintiff was a good risk, and he had promptly furnished the additional margins first required on this particular transaction. He was therefore entitled to expect that he would be notified if further margin was required, and would not be sold out without being given an opportunity to furnish it.

The clause in the confirmation slip did not entitle the defendant to sell without notice. It constitutes an attempt to incorporate a term into a contract already made, which is not permissible: *Connée v. Securities Holding Co. et al.* (1907), 38 S.C.R. 601 at 618.

Even if this clause is to be considered part of the contract, the defendant had waived the right to rely on it, by investigating and finding that the plaintiff was a man of substance, and by its course of dealing with him, having executed transactions on his behalf from the outset of their dealings together without requiring him to furnish margin.

The defendant stood in a fiduciary relationship to the plaintiff, and it was its duty to inform him of the state of the market. It knew that the market was "shaky" at this time, and should have informed him of that fact. 10 C.E.D. (Ont.), pp. 288, 293. A broker is an agent, and as such is subject to the ordinary obligations of an agent: to follow the instructions of the principal; to exercise care and skill; to act in good faith; to avoid situations in which his duty and his interest can conflict; and to account to his principal. He has, further, a right to be indemnified by his principal against loss arising out of the services rendered: *Clarke v. Baillie* (1911), 45 S.C.R. 50 at 54, 89; *Maloolf v. J. P. Bickell & Co.*, 59 S.C.R. 429 at 442, [1920] 1 W.W.R. 407, 50 D.L.R. 590.

There is no Canadian case which holds that a broker can sell out a customer's account without a reasonable attempt to notify the customer. The American authorities may be looked at in this connection: *Clarke v. Baillie*, *supra*, at p. 76.

The following American authorities may be referred to: Gilman on Stock Exchange Law, p. 159; Meyer on Stockbrokers, pp. 441 *et seq.*; *Small v. Housman*, 208 N.Y. 115; *Thompson v. Baily*, 220 N.Y. 471; *Smith v. Craig*, 211 N.Y. 456 at 464; *Keller v. Halsey*, 202 N.Y. 588 at 597; *Heaphy v. Kerr*, 190 App. Div. 810 at 813, affirmed 232 N.Y. 526; *Rosenthal v. Brown*, 247 N.Y. 479; *Sanger v. Price*, 114 App. Div. 78 (N.Y.).

As to the measure of damages, see *Michael v. Hart & Co.*, [1902] 1 K.B. 482; *Greening v. Wilkinson* (1825), 1 Car. & P. 625; *Findlay v. Howard* (1919), 58 S.C.R. 516, 47 D.L.R. 441; *Haack v. Martin*, [1927] S.C.R. 413 at 418, [1927] 3 D.L.R. 19; *Nelson v. Baird & Botterell* (1915), 25 Man. R. 244 at 252, 8

W.W.R. 144, 30 W.L.R. 822, 22 D.L.R. 132; Meyer on Stock-brokers, p. 554.

J. Shirley Denison, K.C., and *G. E. Hill*, for the defendant, respondent. The plaintiff had been dealing with the defendant for a year and a half, and had received about 48 confirmation slips similar to the one here in question, and had also traded in stocks and grain on margin for some 15 years through other brokers. The defendant relies on the terms of the contract, as embodied in the confirmation slip. There is no suggestion of fraud or bad faith in arriving at the conclusion that the margin, in its opinion, was insufficient, and there was also the possibility that the price of the grain might have gone even lower, and the plaintiff might have objected, as traders frequently do, to being called upon to incur further losses on a falling market.

The plaintiff cannot raise any question of waiver, since this ground was not pleaded, and was not an issue either on the pleadings or at the trial; it cannot now be raised after all the evidence has been given.

The defendant relies upon the reasons for judgment of the trial judge, upon the cases cited by him, and upon his decision on the question of credibility: *Cox v. Hourigan*, [1941] S.C.R. 251 at 256, [1941] 2 D.L.R. 457.

The relations of the parties fall to be determined according to the terms of the contract, and our duty was limited to acting in good faith; we were not a trustee, as in cases of bailment or hypothecation.

In *Maloof v. J. P. Bickell & Co.*, 59 S.C.R. 429, [1920] 1 W.W.R. 407, 50 D.L.R. 590, the Court determined the question of the reasonableness of the margin. Here, however, that was expressly left to the broker's opinion, under the clause in the confirmation slip.

In addition to the cases cited by the trial judge, reference may be made to *Beamish v. James Richardson & Sons, Ltd.* (1914), 49 S.C.R. 595 at 597, 6 W.W.R. 1258, 23 C.C.C. 394, 16 D.L.R. 855; *Woodward & Co. Ltd. v. Koefoed*, 31 Man. R. 286, [1921] 3 W.W.R. 232, 37 C.C.C. 329, 62 D.L.R. 431 at 443; *Prudential Exchange Co. Ltd. v. Edwards*, [1939] S.C.R. 135, 71 C.C.C. 145, [1939] 1 D.L.R. 465; *Smith v. Craig*, 211 N.Y. 456 at 463; *Penton v. Southern Ry.* [1931] 2 K.B. 103.

December 31st, 1941. MIDDLETON J.A.:—An appeal by the plaintiff from the judgment of the Honourable Mr. Justice Chevrier bearing date the 22nd of September, 1941, dismissing the plaintiff's claim for damages for the sale and conversion of certain grain futures purchased on margin by the defendant as the plaintiff's agent and broker.

The plaintiff resides at Barrie in the Province of Ontario. The defendant is a brokerage firm carrying on business in Winnipeg. In May 1940 the defendant purchased as agent for the plaintiff 10,000 bushels of October rye, and this rye was purchased at about that time. On the 14th May the price of rye had gone down considerably and it was deemed necessary to further margin the account and \$500 was asked and was put up. On the 15th May the defendant required from the plaintiff further margin and \$1,000 was put up. On the 18th May, the market having further declined, the defendant sold the grain at a sum which almost exhausted the money standing to the credit of the plaintiff, and this action was brought to determine the liability in respect of this sale.

It was shown at the trial that the advice note for the purchase of the grain bore upon its face a statement: "It is further understood that on marginal business the right is reserved to close transactions without further notice when in our opinion margins are insufficient."

Much is made of the fact that this is printed in small type, but it is clear and distinct and is not a part of a general condition limiting liability, but is plainly embodied in a statement of the terms upon which the contract is undertaken.

The plaintiff was a man of experience in connection with brokerage transactions, having dealt on the various exchanges for many years, and had received many accounts containing statements such as that relied upon. In addition to that he was connected with the moving picture business and was familiar with the terms of contracts in connection with that business and these contracts contained much smaller type.

When it is realized that the case depends largely upon the determination of the question of the existence and validity of this term, it will become plain that the plaintiff is unable to maintain this action without reference to this vital term of the dealing.

The facts relating to the sale are that on the morning of the day when the grain was sold the exchange opened at 10.30.

At 11.17 there was a break in this grain. It fell six points in as many minutes and the defendant's representative at Toronto ordered the grain to be sold and it was sold at a price which almost wiped out the entire margin posted in the account, the sale taking place at thirty-three minutes after eleven o'clock, about a quarter of an hour after the break.

It must be borne in mind that the defendant was vitally interested because it had put up the whole price and was carrying the account on margin and any loss over and above the margin must be borne by it.

It is plain that upon the contract as evidenced by the writing the defendant was not bound to face the risk of carrying the grain at a further loss and was entitled to sell on the terms of the agreement.

An endeavour was made at the trial to show that this account was regarded as an exceptional one and that the plaintiff was entitled to treat it on that footing. The trial judge has found, on ample evidence, that the account was not an exceptional one, but was an ordinary account carried on the ordinary terms, and in reality the whole appeal depends upon the accuracy of this finding.

We find nothing in the evidence to justify the allegation, and much to support the view of the trial judge.

It follows that the appeal must be dismissed with costs.

FISHER J.A.:—The appellant is a keen business man and no novice in buying and selling on margin grains and stocks through brokers. He had for years received many bought notes from his brokers containing the same provision as in the case at bar. I refuse to believe that he had not read this particular condition during the many years he had been speculating in the market, and in any event it was, in my opinion, his plain duty to have read the contract under which he purchased this particular rye. I would agree with the appellant's contention that had the respondents, during a normal market, sold this rye without first calling for further margin, they would have acted unreasonably with him. That is, however, not this case. The appellant well knew for some days before he was sold out that the market was in a panicky condition—he had been called and had responded to two calls for margins—and in all these circumstances there was, in my opinion, an obligation on his part to keep his account

properly margined. I find it difficult to believe that the appellant, especially when two recent calls had been made on him, was not aware of the panicky condition of the market. I also refuse to believe that he was indifferent to the market conditions. He would be a most unusual trader if he did not watch the condition of the market through the daily papers. One of the objects of such a provision in the bought note was to safeguard the respondents from loss during a panicky market, and they had a right to act under the conditions of this bought note at the time and for the reasons to which reference has been made.

I fully agree with the reasons and conclusion of my brother Middleton that this appeal must be dismissed.

KELLY J. agrees with MIDDLETON J.A.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Tytler & Sproule, Toronto.

Solicitors for the defendant, respondent: Holmested, Sutton & Hill, Toronto.

[CHEVRIER J.]

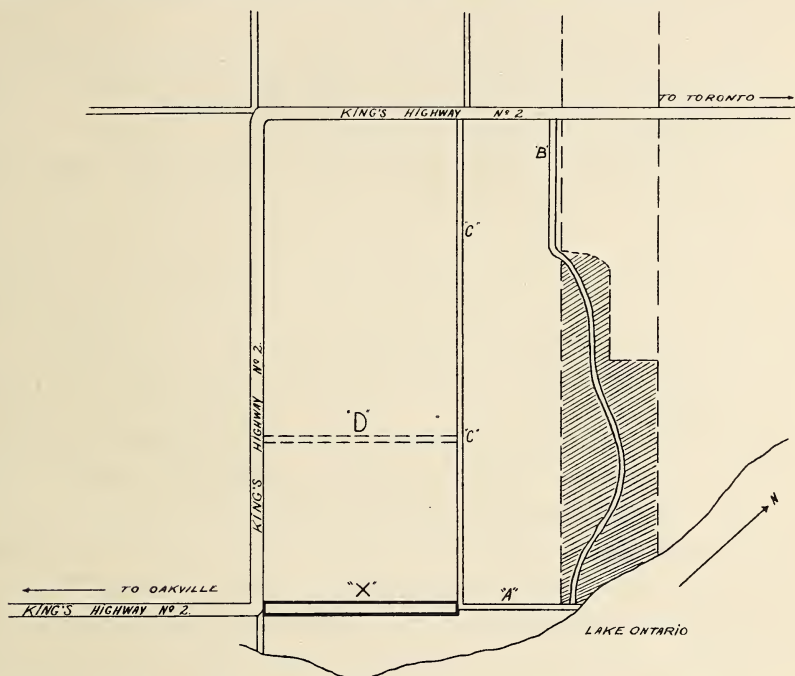
The Trusts and Guarantee Company Limited v. The Municipal Corporation of the Township of Toronto.

Municipal Corporations—Powers—Closing and Opening of Highways—The Municipal Act, R.S.O. 1937, c. 266, s. 496—Inapplicability of Section where Other Means of Access Exists.

S. 496 of The Municipal Act, R.S.O. 1937, c. 266, is inapplicable except where the effect of the proposed closing or alteration of a highway is to deprive some person of means of access to his property. If another means of access exists, even if it is less convenient, the landowner, while he may be entitled otherwise to compensation, is not entitled to rely upon this section.

The plaintiff company, as trustee for the bondholders of Lake Shore Country Club, Limited, sued for an injunction to restrain the closing of a certain highway by the defendant municipality. The following plan shows the system of roads as it existed before the adoption of the by-law in question. It will be seen that the road marked "B" gave direct access to the Club's property from the highway. Access might also be gained by following either the road "C" or the road "X" from the highway, and then entering the Club's property by the road "A". These two

routes are referred to in the judgment as "C+A" and "X+A" respectively. The proposed alteration would close road "X" and open in its place a new road, "D". The shaded portion of the plan represents the property of the Country Club.



The plaintiff pleaded, *inter alia*, "that the effect of the said by-law is and will be to deprive the Plaintiffs and Lake Shore Country Club Limited of the means of ingress and egress to and from their said lands over the road or highway stopped up and closed under the provisions of the said by-law and that by reason of the provisions of section 496 of the Municipal Act being R.S.O. 1937, Chapter 266 the said by-law cannot take effect until the sufficiency of the other road which the said Council purported to provide to the purpose of giving access to the said lands is agreed upon or if not agreed upon until its sufficiency has been determined by arbitration as provided in the said Act."

The defendant pleaded that s. 496 was not applicable to the by-law in question because the by-law did not purport to deprive and did not have the effect of depriving the plaintiff and the Club of their only means of access.

A motion was made to set down for hearing before trial the point thus raised as to the applicability of s. 496. Counsel for

the plaintiff objected that questions of fact were involved, and counsel for the defendant thereupon proposed that instead of the order originally applied for, an order should be made setting the action down for trial in a shortened time. An order was made in accordance with this proposal.

February 12th, 13th, 16th and 17th, 1942. The action was tried before CHEVRIER J. without a jury at Toronto.

Lionel Davis, K.C., for the plaintiff.

C. F. H. Carson, K.C., and *G. B. Jackson, K.C.*, for the defendant.

February 19th, 1942. CHEVRIER J.:—Pending the adjudication of the matters at issue herein, the completion of important war construction work is being held up. It was therefore important that my decision should be made known with the least possible delay, though it involved the consideration of much evidence and of a large number of judiciously selected authorities, and the study of two lengthy arguments replete with material. It is therefore much regretted that because of the exigencies of that situation, time did not allow for the extension further of the reasons for the findings of fact, and for the conclusions of law presented herewith; but the reading alone, and the consideration of the authorities submitted, have consumed considerable time, and it is not to be considered as the treating lightly of a matter that was exhaustively and ably presented by counsel, who went to great pains in the preparation of a subject which is not without difficult and interesting features, and which deserved to be disposed of in the same manner as it was presented.

I am not concerned here with the question of arbitration, or of compensation, as defence counsel, during the trial, admitted that no agreement as to compensation had been reached, that there was no agreement as to the sufficiency or otherwise of the road opened under the by-law, and that neither of those questions had been submitted to, or dealt with by, arbitration.

The honesty and integrity of all witnesses are unimpeachable. . . . [The evidence of certain expert witnesses was then considered].

Having in mind section 496, and having in mind the principles involved and invoked in the numerous cases cited to me, the matter in dispute and at issue resolves itself to this:

(a) Will the effect of the closing of that part of road A+X described as X, be to deprive the owners of means of ingress and egress to and from their land . . . over such highway or part of it, (b) unless . . . another convenient road or way of access to their land . . . is provided?

For the purposes of this case, it is assumed that road "B" does not now exist, but that it is the road to be known as the "other convenient road or way of access which is being provided." I have no hesitation in finding as a fact, that the effect of the closing of that part of road A+X known as X, will not be that of depriving the owners of their only means of ingress and egress to and from their land, because it still leaves road C+A, and road B.

Plaintiffs' counsel laid considerable stress upon the meaning of "convenient road", and has submitted that it means and calls for a "substitution" of roads. I cannot accept that view; Murray's Dictionary, Funk and Wagnall, Webster, define "substitution" as "the putting of a person or thing *in the place* of another",—the offered road could not be placed *in the place* of the one closed; cf. Patterson J.A. in *Re McArthur and Township of Southwold* (1878), 3 O.A.R. 295 at page 307:

"Provide a *new way* and close the old one. You thus place the land owner in exactly the position he would have occupied if, having already two ways, the council closed one of them. . . . It must not be closed so as to exclude any one from access to his land or residence. If that will be the effect, another access must be provided. If he already has another access it has not to be provided."

That, I find, is what is meant, and not "substituting" one road for another. So I conclude that the road to be provided is not one that is to be "substituted" for the one closed, but that it must be a convenient one within the meaning of the authorities, and that it need not be the most convenient one, but that it is sufficient if it be a convenient one; and I do find that the other road, which here would be road B, would in fact be a convenient road within the meaning of the section, and would furnish a convenient means of access to and from the plaintiffs' lands.

I find the words of Patterson J.A. in *Re McArthur and Township of Southwold*, *supra*, most apt to describe what I find here as a fact: "There can be no doubt as to the applicant having 'another convenient way of access';" and in these words, when

he adds: "It is not required that it shall be as convenient as the road which the by-law closes". I am not called upon to make, nor do I make, any finding as to the degree of convenience.

I agree with the submission of defence counsel that the principle of law enunciated in *Re Credit Foncier Franco-Canadien and Village of Swansea*, [1940] O.W.N. 53, [1940] 1 D.L.R. 446, applies here—in the words of the Honourable the Chief Justice of Ontario (p. 56):—

" . . . so long as the owner is not wholly excluded from access to his land by a public highway there is no reason why the closing of any additional means of access he may have cannot be the subject of compensation."

My finding of fact here is that, in the circumstances of this case, the closing of that portion of road A+X, known as X, would not "wholly exclude" the plaintiffs "from access to their lands".

Much evidence was adduced as to the best means of exploiting the said lands. I have accepted the evidence of Bosley and McLaughlin, and therefrom I find, as a fact, that for the purposes for which they have been used and are now being used, if road B had not been in existence, the granting of such road B would have been a sufficient and adequate replacement for the closing of that portion of road A+X known as X, if it had been so offered, as contemplated by s. 496.

As to what future uses the said lands could be put to, or to what development they would best be suited, this is most uncertain, but in this state of uncertainty, having regard to the evidence accepted, I find that if road B had not been in existence at the time the by-law was passed, and if the said road B were not now in existence, and if that portion of road A+X known as X, was being closed, the opening of road B would be adequate and sufficient in lieu thereof, as is contemplated by s. 496.

I conclude by finding, upon these findings of fact and upon the law as it now stands, that s. 496 of the present Municipal Act has no application to the by-law in question herein, and that the action must be, and it is hereby, dismissed with costs.

Counsel for the plaintiffs referred to the following authorities: *Re Thurston and Township of Verulam* (1875), 25 U.C.C.P. 593; *Martin v. Township of Moulton* (1901), 1 O.L.R. 645; *Brown v. City of Owen Sound* (1907), 14 O.L.R. 627; *Adams v. Town-*

ship of East Whitby (1882), 2 O.R. 473; *Re Chinara and City of Oshawa* (1928), 35 O.W.N. 30; *Gilmour v. Township of Westminster*, 64 O.L.R. 344, [1929] 4 D.L.R. 1.

Counsel for the defendants referred to the following authorities: *Re Credit Foncier Franco-Canadien and Village of Swansea*, [1940] O.W.N. 53, [1940] 1 D.L.R. 446; *Jones v. Township of Tuckersmith* (1917), 45 O.L.R. 67, 47 D.L.R. 684; *Re Vashon and Township of East Hawkesbury* (1879), 30 U.C.C.P. 194; *Re McLean and Town of North Bay* (1906), 7 O.W.R. 169.

Action dismissed with costs.

Solicitor for the plaintiff: Lionel Davis, Toronto.

Solicitors for the defendant: Jackson & Copeland, Cooksville.

[HOPE J.]

Lee et al. v. Grenville Patron Mutual Fire Insurance Company.

Insurance—Mutual Insurance Companies—Dual Position of Policyholder in Such Company—Effect of Non-payment of Agreed Instalment of Cash Premium—Notice of Default and Cancellation—Retention of Premium Note by Company after Default—The Insurance Act, R.S.O. 1937, c. 256, ss. 116(1), 117, 118, 119—The Companies Act, R.S.O. 1937, c. 251, ss. 257, 263(3).

The holder of a policy of insurance issued by a mutual fire insurance company occupies a dual position towards the company, being both an insured and an insurer. His liability under his premium note continues, unless he withdraws from the company with the assent of the directors, for the full term of his contract, even if, by default in payment, he has forfeited his right to indemnity in the event of loss. *Pickles v. China Mutual Insurance Company* (1913), 47 S.C.R. 429, 12 E.L.R. 300, 10 D.L.R. 323, applied. Under the present s. 117 of The Insurance Act, the company is entitled, provided the necessary statutory formalities are observed, to relieve itself from liability to indemnify the policy-holder for loss sustained while he is in default, but nevertheless to retain the premium note for the unexpired term of the original contract. *Woolley v. Victoria Mutual Fire Insurance Company* (1899), 26 O.A.R. 321, considered and distinguished.

AN action for the amount of a loss by fire suffered by the plaintiffs, to whom a policy of insurance had been issued by the defendant company. The company admitted the amount of the loss, and the regularity of the proofs thereof, but disputed liability on the ground that the insurance had been terminated as the result of the plaintiffs' default in making payments required under their contract.

February 12th, 1942. The action was tried by HOPE J. without a jury, at Brockville.

C. G. MacOdrum, for the plaintiffs.

W. F. Nickle, K.C., and *H. Beaumont*, for the defendant.

February 24th, 1942. HOPE J.:—The plaintiffs, a farmer and his wife, became insured in the defendant Mutual Fire Insurance Company by policy of insurance No. 60500, dated the 1st day of June, 1938, for the sum of \$5,500. The policy reads in part as follows:

“In consideration of a premium note of \$165.00 does insure Mr. and Mrs. W. J. Lee of the Township of Elizabethtown in the County of Leeds, Province of Ontario (hereinafter called the insured) according to and subject to the provisions of the laws having reference to Mutual Fire Insurance Corporations in the said Province”

A cash payment divided into three instalments of \$19.25 each, payable on the date of the insurance, and the first and second year thereafter, was required of the insured.

The interim receipt issued in the name of the insured, acknowledged receipt of the premium note for \$165.00 and the first instalment of \$19.25, for insurance upon the property described in the application, for three years from the 1st of April, 1938 “upon the understanding that it is insured till notified to the contrary.”

The second and third instalments of the cash payment which fell due on the 1st of April, 1939 and 1940, were not paid, and although the plaintiffs stated that they had received no notice of non-payment, I am satisfied from the evidence of the Secretary and Office Stenographer of the defendant Company, and from the records produced by them, that an instalment notice was mailed to the insured in compliance with s. 118 of The Insurance Act, R.S.O. 1937, c. 256, and that a second and final notice of each of the said instalments was also mailed to the insured in accordance therewith.

On the first of these instalment notices there was printed in clear type a reproduction of The Insurance Act, R.S.O. 1937, c. 256, s. 117(1), and on each of the second and final notices mailed to the insured there was printed in bold type with special attention drawn to it, a reproduction of the said s. 117(1) and (2).

I find that the notices so mailed to the insured in all other respects complied with the provisions of ss. 117 and 118 of The Insurance Act.

On January 28th, 1941, the dwelling house which was insured under the said policy for the sum of \$1,500, and a large part of the contents thereof, insured for \$500, were destroyed by fire. The proof of claim was duly submitted and the regularity thereof and the amount of loss are now admitted. The defendant, however, refuses payment of the claim on the ground that by reason of the non-payment of the second and third cash instalments, and the notices sent out in connection therewith to the insured, the contract of insurance was null and void. There was no suggestion on the part of the plaintiffs that there had been any other determination of the matter by the directors of the defendant company, to relieve against the forfeiture of the insurance under the terms of s. 117, except that, there having been a notice of default sent out voiding the policy for the non-payment of the second instalment, the Company did send out notice of the third instalment and furthermore that in January, 1941, the defendant Company mailed to the insured a copy of the annual report of the defendant Company for the year ending December 31st, 1940, pursuant to s. 263(3) of The Companies Act, R.S.O. 1937, c. 251. This report was received by the plaintiffs two days after the fire, and was produced in Court as an exhibit, although the plaintiffs deny having ever received any one of the four notices with reference to the overdue instalments.

The plaintiffs further submit that the payment of the second and third instalments was secured by their premium note, which was not surrendered to them until the expiration of the three-year term of the policy on April 1st, 1941.

There are therefore only the two aspects of the case to consider: The first is whether or not the premium note having been retained by the Company, can be considered as payment of the second and third instalments, despite the default in paying such instalments and the notices of default sent to the insured.

In *Pickles v. China Mutual Insurance Company* (1913), 47 S.C.R. 429 at 438, 12 E.L.R. 300, 10 D.L.R. 323, Duff J. states that, in the case of a mutual fire insurance company:

"By virtue of the contract of insurance the insured stands in a two-fold relation to the company and the other policy-holders. To the extent of his own policy he is insured; to the extent of his own premium note he is an insurer in the sense that he is a holder of unpaid capital in respect of which he is entitled to share in the profits of the company, and to the extent of that capital he is liable to contribute to the discharge of the obligations of the company."

That case was dealing with a Massachusetts Company, and Massachusetts law was there applied, but I am of the opinion that the same law is applicable here, by virtue of The Companies Act, R.S.O. 1937, c. 251, s. 257, which reads:

"(1) Any person insured under a policy issued by a corporation shall, from the date upon which the insurance becomes effective, be deemed a member of such corporation.

"(2) No member shall be liable in respect of any loss of claim or demand against the corporation beyond the amount unpaid upon his premium note.

"(3) Any member may, with the consent of the directors, withdraw from the corporation upon such terms as the directors may lawfully prescribe," etc.

Therefore, unless the plaintiffs, as members of the defendant Company, withdrew with the consent of the directors, which is in no way suggested in the evidence or argument, then they continue as members for the period of the contract, *viz.*, the three years, even though, during that three years, the plaintiffs for other reasons, may have forfeited the benefits which they held as persons insured.

This is further borne out by the terms of s. 116(1) of The Insurance Act, which reads in part as follows:

"the premium note residue shall be subject to assessments by the directors, . . . in such sums and at such times as they may determine for reserve and for losses and expenses *incurred during the currency of the policies for which such notes were given.*"

This section would appear clearly to contemplate the continuance of liability under a note to cover losses, etc., incurred during the currency of, not the policy for which the note was given, but the policies for which such notes were given; thus referring surely to the currency of a group of policies for a concurrent term. I must conclude that the liability as an insurer to the

extent of the premium note or the residue of it, continues for the period of the contract, and forty days thereafter as set out in s. 119 of The Insurance Act.

Therefore, I am of the opinion that aside from any liability to the plaintiffs as insured, the defendant is entitled to retain the premium note for the term mentioned, as in the nature of a stock subscription from a member of the corporation.

The second point in question is whether or not the non-payment of the second and third instalments, and the default notices sent to the plaintiffs, constituted a cancellation of the liability of the defendant to the plaintiffs as persons insured. Forfeitures are not ordinarily favoured in law, unless provided for in reasonably plain words, and in this regard I have read, with considerable interest, the judgments in *Woolley v. Victoria Mutual Fire Insurance Company* (1899), 26 O.A.R. 321, which is a case almost on all fours with the present, except as to the nature of the notice which was sent out, and except as to the statutory provision covering forfeiture. The predecessor of the present s. 117 was then to be found in very much different form in s. 129 of The Insurance Act, R.S.O. 1897, c. 203, which read in part in these words:

"Provided that non-payment of any of the fixed payments subsequent to the first shall *not* forfeit the insurance *unless* thirty days' notice of the fixed payment due, or to become due, has been mailed to the person by whom the fixed payment is payable, directed to his post office address as given in his original application, or otherwise in writing to the company." Meredith J., at page 324, stated that the draftsman of this clause appeared to have in mind that instead of creating a forfeiture the intention was, and the fair meaning of the words is, to prevent a forfeiture without notice.

The effect of the interpretation of this section by the judgment of Meredith J. apparently resulted in a legislative amendment in 1900, by 63 Vict., c. 17, s. 26, when that portion of s. 129 hereinbefore quoted was amended by striking out the word "not", italicized in the extract above, and changing the word "unless", similarly italicized above, to the word "if".

The provision of this early section then passes through various legislative amendments, *viz.*, (1912) 2 Geo. V, c. 33, s. 141(4), to (1914) R.S.O. c. 183, ss. 141(4), 142, 143 and 146,

to (1924) 14 Geo. V, c. 50, s. 102—this in its present form to (1927) R.S.O. c. 222, s. 108, and thence to the present s. 117.

I do not find the cases cited to me by the plaintiffs' counsel applicable hereto, and I must conclude that the action of the Company in cancelling their liability to the plaintiffs as insured, has been in accordance with statutory requirements and that default having been so made by the plaintiffs, the contract of insurance is null and void.

It might also be noted here that s. 117 has not the effect of terminating the contract so far as the plaintiffs are concerned as members of the Company, and thus insurers to the extent of their premium note, and for the purpose of receiving notices of annual meetings and annual statements, but s. 117 does clearly and explicitly render the contract of insurance null and void only as to claims for loss occurring during the time of default.

I must therefore direct that judgment be entered dismissing the action with costs, if demanded by the defendant.

Action dismissed with costs.

Solicitor for the plaintiffs: C. G. MacOdrum, Brockville.

Solicitors for the defendant: Casselman & Beaumont, Brockville.

[COURT OF APPEAL.]

Smith v. Stevenson.

Insurance—Extent of Coverage—Goods Held in Trust or for which Insured May be Responsible—Liability of Insured as Bailee—The Insurance Act, R.S.O. 1937, c. 256.

The plaintiff, whose business consisted in part of "processing" calendars for customers, was insured by the defendant against fire. The subject-matter of the insurance was described as "stock . . . , the property of the Assured, their own, held in trust or on commission for which they may be responsible". A fire occurred in the plaintiff's premises, resulting in the destruction of a large number of calendars, the property of one of the plaintiff's customers. It was conceded that the fire occurred in circumstances which excused the plaintiff from responsibility for the loss. *Held*, the plaintiff was entitled to recover the value of these calendars under the contracts of insurance. The wording of the contracts indicated that they effected insurance of the goods themselves, while in the insured's hands, for the benefit of whatever persons might be interested in them; it was not a mere insurance against the plaintiff's liability as a bailee. *Maurice v. Goldsbrough Mort & Company Ltd.*, [1939] A.C. 452, [1939] 3 All E.R. 63, [1939] 2 W.W.R. 557, applied; earlier decisions reviewed.

AN appeal from the judgment of Plaxton J., dismissing the plaintiff's action, in circumstances indicated in the above head-note, and in the judgments now reported.

January 13th, 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and FISHER JJ.A.

T. J. Agar, K.C., for the plaintiff, appellant. The plaintiff, having a limited interest in the stock of calendars, was entitled to insure them as "his own" for the benefit of all interests therein: *Castellain v. Preston* (1883), 11 Q.B.D. 380 at 398; *Ritchie and Dobbie v. Stanstead & Sherbrooke Fire Ins. Co.*, [1940] O.W.N. 39, 7 I.L.R. 41, [1940] 1 D.L.R. 241, affirming [1939] O.W.N. 436, 6 I.L.R. 159, [1939] 3 D.L.R. 525; *Drum-bolus v. Home Insurance Co.* (1916), 37 O.L.R. 465 at 469. He stood in such a relation to them that he might be, and was, prejudiced by their loss and damage. He expected to derive a profit and other advantages from his work on them, and had therefore an insurable interest, both in this capacity and as bailee: *Maurice v. Goldsbrough Mort & Co.*, [1939] A.C. 452, [1939] 3 All E.R. 63, [1939] 2 W.W.R. 557; *Macaura v. Northern Assurance Co.*, [1925] A.C. 619; *Cole v. Merchants Fire Insurance Co.* (1921), 51 O.L.R. 340, 67 D.L.R. 300.

The plaintiff was entrusted with these calendars for the purpose of "processing" them, and they are therefore within the words "held in trust" in the contracts: *Cole v. Merchants Fire*

Insurance Co. (1921), 51 O.L.R. 340, 67 D.L.R. 300; *Home Ins. Co. v. Baltimore Warehouse Co.* (1876), 93 U.S. 527.

The words "for which they may be responsible" apply only to goods held "on commission", on a proper reading of the contracts. Any ambiguity in this connection should be resolved against the insurer, whose wording it is: *Thomson v. Weems* (1884), 9 App. Cas. 671.

Even if these words are applicable, they do not defeat the plaintiff's claim. The question is not whether plaintiff *was* responsible, in the event which happened, but rather whether, because of the terms on which he received the goods, he *might have been* responsible: *Home Ins. Co. v. Peoria P.U. Ry. Co.* (1899), 52 N.E. Rep. 862. The words "may be" distinguish this case from *North British & Mercantile Ins. Co. v. Moffatt* (1871), L.R. 7 C.P. 25; *North British & Mercantile Ins. Co. v. London, Liverpool & Globe Ins. Co.* (1877), 5 Ch. D. 569, and *Engel v. Lancashire & Gen. Assur. Co. Ltd.* (1925), 30 Com. Cas. 202, 41 T.L.R. 408.

Gordon N. Shaver, K.C., for the defendant, respondent. Although a person with only a limited interest may insure the whole property for the benefit of whom it may concern, yet if there is no mention in the policy of his intention to do more than insure his own interest, he cannot recover more than the value of that interest in the event of loss: *Cumming et al. v. Homestead Fire Insurance Co.*, [1935] O.R. 161, 2 I.L.R. 105, [1935] 2 D.L.R. 261.

The wording of the contracts should be construed as an insurance merely against the plaintiff's liability to others for these goods, and since, on the trial judge's findings of fact, he was not liable, he is not entitled to collect under the contracts. [Counsel here cited the authorities dealt with at length in the judgment of Robertson C.J.O.].

Cur. adv. vult.

February 19th, 1942. ROBERTSON C.J.O.:—An appeal from the judgment of Plaxton J., dated 10th October, 1941, on the trial of the action before him at Toronto, without a jury.

The action is brought by the insured upon three contracts of insurance to recover the sum of \$2,000, the aggregate amount insured by the three contracts. The insurance is against the risk of fire and lightning, and the subject matter of the

insurance is described in identical terms in the three contracts, as follows:

“On stock, machinery, tools and furniture, the property of the Assured, their own, held in trust or on commission for which they may be responsible, while contained in the brick, 1st class roofed, sprinklered building, Nos. 217-227 Richmond St., West, Toronto, Ontario.”

During the currency of the contracts a fire occurred on the premises and damage was done to some of the contents. Proofs of loss were delivered, to which were attached particulars of the loss as follows:

Work on calendars—63,500 calendars	\$150.00
Metal ‘M.C.’	150.00
63,500 calendars, property of Brigdens Limited at	
2.68 cents each, replacement value	1,701.80
	<hr/>
	\$2,001.80

It is part of the insured’s business to attach metal strips to calendars being made up by its patrons, and to sew on the date pads. The calendars referred to in the proofs of loss were in the insured’s hands for these purposes, and were the property of Brigdens Limited. The first two items in the proofs of loss represent the value of the insured’s own work and materials on such of the calendars as had been completed. The claim was not disputed in so far as these items are concerned, and \$306.25 was paid into Court with the statement of defence as in full satisfaction of the whole claim. The third item in the proofs of loss is disputed, the insurers taking the position that the calendars, the property of Brigdens Limited, were not insured by them.

The description of the property insured as set forth in these contracts follows a form that, with some variation in wording, has been widely used in insurance contracts for many years. There are a number of reported cases that deal with descriptions generally in this form, but it may be that the precise point raised in this case has not been directly the subject of any reported decision.

It is not questioned here that these calendars come within the description of “stock . . . held in trust”, the words “held in trust” signifying not a trust in the strict sense, but merely that the goods have been entrusted to the insured. The princi-

pal question that is raised in this case is whether the words "for which they may be responsible" do not exclude these calendars of Brigdens Limited from the protection of the insurance.

The insured was bailee of these calendars "for hire of work and labour." In case of loss or injury to the goods while in its custody, the insured, as bailee, was responsible for the full amount of the damage sustained, unless it could show that the loss or injury was attributable to inevitable accident, inherent vice or some other extraneous cause and not to any want of care on its part: 1 Halsbury, 2nd ed., para. 1260. The learned trial judge has held on evidence that is not disputed that the fire that destroyed the calendars was not caused by any fault or negligence on the part of the insured, but was accidental. He held that as the insured was under no liability to Brigdens Limited for the loss of the calendars, the insurer, in turn, was not liable under the contracts of insurance for that loss.

For the appellant it is argued that the question whether or not these calendars of Brigdens Limited were covered by the insurance contracts is not to be determined by reference to the character of the fire that destroyed them, or its cause, but by the proper interpretation of the description contained in the insurance contracts of the subject-matter insured. As it was put by counsel for the appellant, one is not to wait until there has been a fire and its cause has been investigated and decided, before it is determined whether or not certain goods, injured or destroyed, were insured, but that the whole question is whether, before their destruction, the goods are within the description of the property insured contained in the insurance contract. It is argued for appellant that the calendars in question when in its custody, answered the description of "stock . . . held in trust . . . for which they may be responsible."

It is necessary to review the course of the decisions that deal with the proper interpretation of insurance contracts in this general form, for there has been some difference of judicial opinion regarding it. In *Waters and Steel v. Monarch Fire and Life Assurance Company* (1856), 5 El. & Bl. 870, 25 L.J.Q.B. 102, and in *London and North Western Railway Company v. Glyn* (1859), 1 El. & El. 652, 28 L.J.Q.B. 188, it was established that a bailee such as appellant, has an insurable interest in the goods entrusted to him. It was further established that where

the insurance is upon goods held "in trust or on commission" the goods themselves and not merely the insured's interest in them is covered, and the insured is entitled to recover the full amount insured up to the value of the goods. It was said in these cases that the excess beyond the amount of the insured's own interest would be held by him in trust for the owner of the goods, notwithstanding that the owner was not even informed of the existence of the insurance.

In the cases I have just cited the bailee of the goods insured—in the one case, warehousemen, and in the other, carriers—were not liable, in the circumstances of either case, to the owners of the goods for their loss, but it was held that that made no difference. In the *Glyn* case it was said that if insurance companies wished, in granting such policies, to limit their responsibility to the responsibility of the bailee, they must employ precise words to that effect. Perhaps because of this admonition there appears after the words "in trust or on commission" the words "for which they are responsible" in the policies that were in question in the cases of *North British and Mercantile Insurance Company v. Moffatt* (1871), L.R. 7 C.P. 25, and *North British and Mercantile Insurance Company v. London, Liverpool, & Globe Insurance Company* (1877), 5 Ch. D. 569. The first of these cases was an action by the Insurance Company to recover from the insured an amount it claimed to have overpaid in respect of a loss. The insured were wholesale tea merchants, and before the fire they had re-sold the goods in question (which goods were warehoused with a wharfinger) to purchasers, at whose risk the goods then became. It was held that the goods were not covered by the policy. It is clear that the goods there in question were not at any time goods for which the insured were responsible to anyone, for the goods were, when insured, the assureds' own, and before the fire they became the goods of their vendees to whom they were not responsible. The case is one to be considered here because of what was said in distinguishing it from the *Waters* case and the *Glyn* case already referred to, by reason of the insertion of the words "for which they are responsible." At p. 31 Keating J., who gave the judgment of the Court, said, "In *London and North Western Ry. Co. v. Glyn*, Erle and Hill JJ. had thrown out that if insurance companies wished in future to limit their responsibility to the responsibility of the assured, they must employ express

words to that effect. It seems to me that the present plaintiffs have done so in this policy, and have expressly limited their liability to such goods as were held in trust by the assured, and for which they were responsible."

The case of *North British and Mercantile Insurance Company v. London, Liverpool & Globe Insurance Company, supra*, does not, on its facts, appear to raise any question that arises here, but it is referred to because of the terms in which the trial judge, Jessel M.R., described an insurance of goods "held in trust, or for which they (the insured) are responsible." He said that it is "an insurance in terms against liability."

The four cases to which I have heretofore referred were all discussed by Roche J. (now Lord Roche) in *Engel v. Lancashire and General Assurance Company, Limited* (1925), 30 Com. Cas. 202, 41 T.L.R. 408. The insured was a manufacturing furrier and was insured against the risks of burglary and theft, amongst others. The insurance was upon his stock-in-trade on the business premises of the insured, and covered, besides his own property, goods held by him "in trust or on commission for which assured is responsible." Goods were stolen from the premises, some of them the property of the insured, and some the goods of others that were in his possession in the course of his business. It was found that the insured was not guilty of any negligence as bailee of the goods entrusted to him to work upon, and that he was not liable to pay the value of these goods to their owners. The learned judge put the point to be decided between the insurer and the insured in respect of the claim for loss of goods of the latter class, in this way:—

"If the word 'responsible' means 'liable in case the goods are lost by the peril or perils covered by the policy,' the company is right in its contention. If on the other hand the word 'responsible' is a word which extends the words 'in trust' rather than limits them, then the claimant is correct in his contention and the arbitrator is correct in his finding, which is in favour of the claimant. The contention of the claimant is that the word 'responsible' refers to the general responsibility of a bailee for goods and is not limited by his liability in case of loss."

After reviewing the four cases that I have already referred to Roche J. decided in favour of the Insurance Company, and he said that the real basis of his decision was the actual decision

in *North British and Mercantile Insurance Company v. Moffatt* (*supra*).

It will be seen by reference to the report of the *Engel* case in 30 Com. Cas., where it is fully reported, that in the course of argument for the claimant, more than one contention was advanced as to the effect to be given to the insertion of the words "for which they are responsible." It was said that these words add a further class of goods to what are insured, and that they are not words that qualify what precedes them. It was contended, alternatively, that these words qualify only the words "on commission" that immediately precede them, and do not relate to goods held in trust. Roche J. rejected both these contentions and held, following the *Moffatt* case, that the words "for which they are responsible" limited both classes of goods—goods "held in trust" as well as goods "on commission".

Something, however, more fundamental was decided in the *Engel* case and in the *Moffatt* case, as Roche J. interpreted that decision. It was held that by inserting the words "for which they are responsible", the policy became an insurance to protect the person who held goods in trust or on commission against his own responsibility, and was not an insurance of the goods that came within the description in the policy for the benefit of all who had an interest in them. It was "an insurance in terms against liability." If that is the correct view of such a policy, there is, beyond question, not much ground for an attack upon the judgment in the present case. This action is admittedly carried on, since the payment into Court, for the sole benefit of Brigdens Limited, in trust for whom appellant would hold any further sum recovered.

Appellant cited *Maurice v. Goldsbrough Mort and Company, Limited*, [1939] A.C. 452, [1939] 3 All E.R. 63, [1939] 2 W.W.R. 557. There the insurance was on "merchandise the assured's own property or held by them in trust or on commission for which they may be liable in the event of loss or damage by fire." The action was by a wool grower against wool brokers with whom the grower had stored wool for sale on commission. The brokers insured the wool in their own names. While it was still lying in store the wool was destroyed by fire. The insurers paid the brokers the value of the wool destroyed, and the brokers rendered the grower of the wool an account of the insurance money received, making certain

deductions. The action related to the right of the brokers to make some of these deductions, but while the matter decided is this dispute between the brokers and the grower, and the insurers were not parties to the action, it was essential to the decision to determine the nature of the insurance and the character in which the brokers held the money paid to them under the policies.

The brokers, in the case cited, were under obligation to the grower to insure the wool and it is upon this, rather than upon any relationship of bailor and bailee, that their liability to the grower, in the event of loss or damage by fire, rested. Lord Wright, by whom the judgment was delivered, deals with the position as between the brokers and the insurers at p. 460 and following pages. He refers to the cases of *Waters and Steel v. Monarch Fire and Life Assurance Company, London and North Western Railway Company v. Glyn* and *North British and Mercantile Insurance Company v. Moffatt*, which I have already discussed, and to the history of this form of cover, but nowhere does he describe or discuss the insurance affected by the brokers as insurance against liability. Throughout it is dealt with as an insurance of the wool, and the principles established in the *Waters* case and in the *Glyn* case were held to apply. The insured was entitled to recover from the insurers the full value of the goods destroyed, and the insured was trustee of the insurance moneys received for the owners of the goods, subject to their lien for their own interest in the goods. The *Engel* case does not appear to have been cited, and it is important to note that Lord Wright was dealing with a case where responsibility by the brokers, in the form of an obligation to insure the wool, was not disputed, nor was the amount payable by the insurers disputed. The question ultimately to be decided was the interest of the insured and of the owners in the insurance money. Nothing would seem to have turned upon the words of the policy "for which they *may be* liable in the event of loss or damage by fire", as distinguished from the words "for which they *are* responsible" in the *Engel* case.

It would seem to be the clear result of the judgment in the case of *Maurice v. Goldsbrough* that the insertion in the description of the subject-matter of the insurance of the words "for which they may be liable" or other similar words, does not alter the character of the insurance from that ascribed to it in the

Waters and *Glyn* cases. It still remains an insurance of the goods themselves for the benefit of whatever persons may have interests in them, and does not become a mere insurance of the bailee against liability as held in the *Engel* case. The basis of the judgment is that the policy insures the goods described in the policy, and that the insured is entitled to recover their whole value from the insurers and that "In effect, in a policy of this nature, the policy moneys represent the goods when the goods are destroyed by fire, and the rights in these moneys are apportionable according to the respective interests or property rights in the goods themselves." In so far as anything contained in the judgments in the *Moffatt* case or in the *Engel* case decided anything to the contrary as the effect of the insertion of the words "for which they (the insured) are responsible" they must be taken to be overruled by the judgment in *Maurice v. Goldsbrough*.

There remains, however, the further question—and it is by no means easy to answer—whether the calendars in question come within the description of "stock . . . held in trust . . . for which they (the insured) may be responsible". Appellant does not contend, as was contended for the claimant in the *Engel* case, that the words "for which they may be responsible" do not apply to stock "held in trust". Neither is it contended that appellant was in fact responsible to its bailors for the loss by fire that occurred. Appellant's counsel distinguishes between "for which they *are* responsible"—the words in question in the *Moffatt* and *Engel* cases—and "for which they *may* be responsible," which are the words in these contracts. To put appellant's contention in this regard more fully, it is this: the words "for which they may be responsible" are part of the description of the subject-matter of the insurance; they qualify and limit the words "stock . . . held in trust or on commission;" it is, according to the proper reading of the contracts "stock . . . for which they may be responsible" and not "loss . . . for which they may be responsible" nor "fire for which they may be responsible." Then, the contention is, the calendars in question as they stood in appellant's premises before the fire, came clearly within the description of "stock . . . for which they may be responsible," and they were, therefore, covered by the insurance contracts. The contracts being in their nature an insurance of the goods themselves that come within the description, and an insurance

for the benefit of all who had interests in the goods, and not a mere indemnity of the appellant against its liability to the owners, it is contended for appellant that, so far as the question what goods were covered is concerned, the insurance contracts must be interpreted with reference to a time when the goods were in existence, and by reference to the terms on which they were then held, and not by reference to the circumstances of the fire that destroyed them. On these grounds appellant contends that the calendars in question held by it for Brigdens Limited, were within the description of "stock . . . for which they (the appellant) may be responsible," even if, after their destruction by fire, it should be determined that the circumstances of the fire were not such as to make the appellant responsible for it.

For respondent it is argued that the two expressions "is responsible" and "may be responsible" are not distinguishable, having regard to the fact that the insurance, even if it is not a mere indemnity of the insured against liability (which respondent contends it is), is in respect of an event that is in the future, and that the intention is to limit the cover to losses for which, when the event happens, the insured is responsible.

Giving the best consideration I can to the respective contentions, it seems to me that the best that can be said for the respondent with any feeling of certainty is that the expression is ambiguous. Having in mind that as bailee appellant had in fact a substantial responsibility for the protection of the calendars in question against loss by fire, and had an insurable interest in the calendars that entitled it to insure them for their full value, and having it further in mind that the insurance contracts were intended (as, in my opinion, they were intended) to cover goods that might be brought into stock during the currency of the insurance contracts, I incline to the view that the proper interpretation of the words "for which they may be responsible" is that contended for by the appellant. Even if the expression is ambiguous, the contracts being in terms put forward by the respondent, must be construed against it in default of anything to turn the scale towards another meaning.

It was suggested for the respondent, but I thought not strongly pressed, that the insurance contracts in question covered only stock in the premises mentioned at the time the respective contracts were made. In my opinion this was not the intention of the parties. Each of the insurance contracts was for the

period of one year, and two of them were renewals of earlier contracts. The nature of the insured's business was such that both parties must be taken to have known that there would be constant changes in the stock, both such as was the insured's own and such as was held in trust. I think the principle of such cases as *Butler v. Standard Fire Insurance Company* (1879), 4 O.A.R. 391, and *Merchants Fire Insurance Company v. Equity Fire Insurance Company* (1905), 9 O.L.R. 241, may be applied here.

A question is raised as to a co-insurance clause contained in the contracts. I have avoided the use of the term "policy" throughout because there is a dispute as to whether there were formal policies delivered, although each of the contracts is expressed to be "subject to the terms and conditions of the policy of the underwriters." What were produced at the trial, however, were referred to as "cover notes", and I think are also sometimes called "slips". Each of the cover notes contains a 90 per cent. co-insurance clause, and this is set out in the statement of defence, but without any further allegation or claim in respect to it. In the evidence at the trial there is nothing more than a mere incidental reference to the co-insurance clause, and as the trial judge dismissed the action there was no occasion for him to refer to it.

On the argument of the appeal counsel for the appellant set up the provisions of s. 107(1) of the Insurance Act, R.S.O. 1937, c. 256, which requires where a policy contains a co-insurance clause that there will be printed or stamped upon its face in conspicuous type and in red ink "This policy contains a co-insurance clause", and provides that unless these words are so printed or stamped, such clause shall not be binding upon the insured. Nothing of that kind is printed or stamped upon the cover notes that were filed at the trial as the insurance contracts. It was asserted for the respondent that there were formal policies delivered, and as this was not conceded, the Court suggested that counsel should confer upon the matter, and, if possible, agree upon a statement of the facts. Counsel were, apparently, unable to agree, and so far as the record is concerned, it stands as it was.

The appeal will be allowed with costs, and judgment will be entered for the appellant with costs, for the amount sued for, with interest and costs. If the respondent desires to further

pursue the matter of co-insurance, that matter may be spoken to on notice to the other side.

MIDDLETON J.A. agrees with ROBERTSON C.J.O., and has nothing to add.

FISHER J.A.:—At the time the respondent issued the certificates of insurance it was well known to the insurer that one of the characteristics of the appellant's business was processing calendars for customers, and with that knowledge the respondent insured not only the "stock, machinery, tools and furniture, the property of the insured, but stock held in trust or on commission for which they may be responsible while contained in the brick first class roofed sprinklered building Nos. 217-227 Richmond Street West, Toronto, Ontario."

By the certificates of insurance the respondent contracted to indemnify the appellant against loss by fire of any of the property above described. The calendars entrusted by Brigdens Limited for processing, were admittedly, and without negligence on the part of the appellant, destroyed by fire, and, therefore, no question arises relative to any liability as bailee to Brigdens Limited.

The important question is: Do these certificates of insurance cover these particular calendars? The learned judge, Mr. Justice Plaxton, was of the opinion that as the fire was accidental, and the appellant was under no liability to Brigdens Limited there was no liability by the respondent to the appellant.

I am with the greatest respect unable to agree with the trial judge's conclusions. In my opinion, these calendars were delivered by Brigdens Limited to the appellant in the ordinary course of his business, and were goods held by the appellant in trust during the processing period, and come directly within the meaning of the words in the policy as goods "held in trust." It was well known to the respondents that during the processing of any goods of the customers of the appellant—in this case the calendars—the goods were to be held in trust by the appellant and that they were responsible until they had completed the work agreed to be done upon them, and thereafter the goods were to be delivered to Brigdens Limited.

My difficulty is in understanding why the words "in trust" were inserted in these certificates if they were not to mean

and cover such goods as these calendars. The appellant having an insurable interest in these calendars, and the respondent having contracted by the certificates of insurance—apart from who was the real owner of the goods insured—to indemnify the appellant against loss by fire, it cannot, in my opinion, escape liability upon the ground that as the appellant was under no liability to Brigdens Limited the respondent is under no liability to the appellant. The question of whether or not the appellant was under liability to Brigdens Limited is something entirely outside and foreign to the terms of these certificates of insurance.

I fully agree with the reasons and conclusions of my Lord the Chief Justice and would allow the appeal with costs, including the costs of the action.

Appeal allowed with costs and judgment entered for plaintiff with costs.

Solicitor for the plaintiff, appellant: Marjorie F. E. Henry, Toronto.

Solicitors for the defendant, respondent: Shaver, Paulin & Branscombe, Toronto.

[COURT OF APPEAL.]

Patton et al. v. Yukon Consolidated Gold Corporation Limited et al.

Courts—Appeals to Privy Council—Functions of Court on Motion to Admit Appeal—Nature of Order on such Motion—The Privy Council Appeals Act, R.S.O. 1937, c. 98, ss. 1, 2, 10.

A motion, under The Privy Council Appeals Act, R.S.O. 1937, c. 98, to admit an appeal to the Privy Council, may be made, by the combined effect of ss. 2 and 10, either to a single judge of the Supreme Court or to the Court of Appeal. *Lovibond v. Grand Trunk Railway Co. of Canada*, [1934] O.R. 729, at 747, 43 C.R.C. 38, [1935] 1 D.L.R. 179, agreed with. On such a motion, the Court acts not merely as an administrative body, but judicially, and is not bound to admit the appeal merely because it falls within the provisions of s. 1. The section is essentially restrictive, and limits, rather than grants, a right of appeal. *McBride v. Ontario Jockey Club Ltd.*, 58 O.L.R. 267, [1926] 1 D.L.R. 743, agreed with. Further, the Privy Council expects, and is entitled to expect, a judicial consideration from this Court on any such motion, and would probably not permit the same matter to be again inquired into. *Davis v. Shaughnessy*, [1932] A.C. 106, [1932] 1 W.W.R. 407, [1932] 1 D.L.R. 417, applied.

Applying these principles, *held*, an appeal should not be admitted where great changes had occurred in the positions of the parties, and new rights and obligations had come into being, based upon the finality of the judgment now sought to be appealed from, almost eight years having elapsed since the delivery of that judgment.

The order of a judge refusing to admit an appeal, under s. 2 of the Act, is interlocutory rather than final, and there is therefore no right of appeal from such an order without leave. It does not dispose of substantive rights of the parties, but is in its nature collateral and procedural. *Re Boulton and Toronto Terminals Railway Co. Ltd.*, [1933] O.R. 816, 41 C.R.C. 381, [1933] 4 D.L.R. 621, applied.

AN appeal by the defendant Treadgold from an order of Rowell C.J.O., refusing to admit his appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal herein, [1934] O.W.N. 321, [1934] 3 D.L.R. 400. A previous motion to the same effect had been dismissed by Middleton J.A., whose reasons are reported in [1936] O.R. 308, and an appeal from this judgment was dismissed without written reasons, because the appellant had failed to give security for costs, but without prejudice to any future application, to be made after furnishing proper security.

June 14th, 1937. The motion was heard by ROWELL C.J.O. in Chambers at Toronto.

J. R. Cartwright, K.C., and *W. L. Wallace*, for the defendant Treadgold, applicant.

D. L. McCarthy, K.C., for the plaintiff, respondent.

R. S. Robertson, K.C., for the other defendants, respondents.

June 15th, 1937. ROWELL C.J.O.:—The defendant Treadgold applies for an order admitting the appeal of the appellant

to His Majesty in His Privy Council. This defendant made a similar application to Middleton J.A. on 21st April, 1936, and, after hearing argument, the application was dismissed.

The facts of the case are sufficiently set forth in the judgment of Middleton J.A. in [1936] O.R. 308.

The application was dismissed on two grounds: first, that the money was paid into Court as security upon a joint appeal of Treadgold and The North Fork Power Co. Ltd., and as the North Fork Power Co. had dropped out as appellant, Treadgold could not make the money available as security upon an appeal by himself solely. The second and more serious ground was the delay on Treadgold's part in making the application, and the changed position of the other parties to the action.

From this order Treadgold appealed to the Court of Appeal, which dismissed the appeal but without prejudice to any application that might be made after proper security had been given, as required by The Privy Council Appeals Act, R.S.O. 1927, c. 86, s. 2.

On the 17th December, 1936, an order was made by the Honourable Mr. Justice Macdonnell declaring that the North Fork Power Co. Ltd. had no interest in the \$2,000.00 paid into Court on or about the 17th October, 1935, to the credit of this action. On the 8th June, 1936, the defendant, Yukon Consolidated Gold Corporation Limited, obtained a stop order in respect of the said sum of \$2,000.00 so paid in as security, and on the same day the Yukon Telephone Syndicate Limited and others also obtained a stop order in respect of the said \$2,000.00.

Having obtained the order from Mr. Justice Macdonnell above referred to, the defendant Treadgold now renews his application, pursuant to the leave reserved in the judgment of the Court of Appeal. The application is opposed by Mr. Robertson and Mr. McCarthy. It was stated that notice of the application had been served upon the solicitors for the parties who had obtained the stop orders, and Mr. Robertson also opposed the application on their behalf.

The main ground on which Mr. Justice Middleton dismissed the original application was the delay of Treadgold in taking proceedings to appeal to the Privy Council and the change in the position of the other parties to the action, more particularly set forth in his reasons for judgment. As far as I can ascertain the Court of Appeal did not express any opinion on this phase

of the case, and under these circumstances I feel it is my duty to follow the decision of Middleton J.A. It is therefore unnecessary to express any opinion on the other grounds of objection urged by Mr. Robertson and Mr. McCarthy.

The application is dismissed with costs.

The defendant Treadgold appealed from this judgment, and at the same time, in the alternative, moved the Court of Appeal, in the exercise of its original jurisdiction, to admit his appeal to the Privy Council.

February 10th, 1942. The appeal and motion were heard by MASTEN, McTAGUE and GILLANDERS JJ.A.

J. W. Pickup, K.C. (*C. C. Calvin, K.C.*, with him), for the defendants other than Treadgold, respondents, raised certain preliminary objections: The appeal is too late, since it is not brought until four years after the making of the order appealed from. It is true that Rowell C.J.O. granted an extension of time for appealing, but that extension was only until after the determination of a pending motion, and the applicant in that motion died shortly after the extension was given, with the result that the motion was not proceeded with. No explanation is offered for the delay, and no case is now made for an extension of time.

Further, the order of Rowell C.J.O. is not a final, but an interlocutory, one, and no leave to appeal has been obtained. *Re Boulton and Toronto Terminals Railway Co. Ltd.*, [1933] O.R. 816, 41 C.R.C. 381, [1933] 4 D.L.R. 621; *Lovibond v. Grand Trunk Railway Co. of Canada*, [1934] O.R. 729, at 747, 43 C.R.C. 38, [1935] 1 D.L.R. 179.

As to the alternative motion, it is made to the wrong tribunal. Under s. 10 of The Privy Council Appeals Act, R.S.O. 1937, c. 98, the motion should be made to a single judge, and making it to the full Court deprives the respondent of its right of appeal, and is an abuse of the process of the Court. The fact that a single judge might feel bound to follow the orders of Middleton J.A. and Rowell C.J.O. is no reason for coming directly to the Court of Appeal.

D. L. McCarthy, K.C., for the plaintiff Patton, respondent, associated himself with this argument.

J. R. Cartwright, K.C. (*W. L. Wallace* with him), for the defendant Treadgold, appellant: As to the appeal being too late, it is brought within the extended time allowed by the order

of Rowell C.J.O., since the motion pending at that time has not been finally determined.

The order of Rowell C.J.O. is not interlocutory, but final. *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. The cases cited by Mr. Pickup on this point are distinguishable, on the ground that in both of them leave was in fact granted, and it was therefore unnecessary to decide whether it was necessary.

As to the alternative motion, we are entitled to make it to this Court, under s. 2 of the Act, which creates a procedure alternative to that provided for by s. 10. *Lovibond v. Grand Trunk Railway Co. of Canada*, *supra*.

J. W. Pickup, K.C., in reply, on the preliminary objections, referred to *McBride v. Ontario Jockey Club Ltd.*, 58 O.L.R. 267, [1926] 1 D.L.R. 743.

J. R. Cartwright, K.C., then argued as to the merits: If the case falls within s. 1 of the Act, and the security is satisfactory, the Court must admit the appeal. When the Legislature confers a right of appeal, as it does by s. 1, and imposes specified conditions, the Court is not entitled to impose additional conditions. In this case, every condition in the Act is complied with, the defendant may appeal to the Privy Council as of right, and the Court has no jurisdiction to refuse to admit the appeal. Middleton J.A. incorrectly interpreted *E. W. Gillett & Co. Limited v. Lumsden*, [1905] A.C. 601, and *Davis v. Shaughnessy*, [1932] A.C. 106, [1932] 1 W.W.R. 407, [1932] 1 D.L.R. 417, in considering that these cases gave him authority to determine the competency of the appeal, apart from the statutory provisions.

J. W. Pickup, K.C. (having been instructed by the Court to limit his argument to the alternative motion): We considered that the order of Rowell C.J.O. had become final, and the company reorganized on the basis of the finality of that order.

No case is to be found where an appeal has been admitted after the lapse of a number of years, and although the Act does not prescribe any time for appealing, some reasonable period of time must be implied. *R. v. Hayes* (1924), 55 O.L.R. 635, at 637, 43 C.C.C. 398; *Windsor, Essex and Lake Shore Rapid Railway Company v. Nelles*, [1915] A.C. 355, at 362, 20 D.L.R. 713. Holmsted's Ontario Judicature Act, 5th ed., p. 792.

The Court is not a mere rubber stamp, but has a discretion, and in fact a duty, to perform. Cameron, The Canadian Con-

stitution and the Judicial Committee, vol. 1, p. 3. The statute sets out certain matters which must be considered by the Court, but it does not provide that other matters cannot be considered. The prerogative of the Court is in no way interfered with.

The security was paid into Court for an appeal by two proposed appellants, and now the appellant Treadgold seeks to use that security for an appeal by him alone.

The action was originally brought by three plaintiffs. Two of these plaintiffs have died, and the action has not been revived. No appeal can be admitted until the action is properly constituted.

The security does not comply with the Act. It was paid in by a stranger to the litigation, while under ss. 2 and 10 it must be paid in by the proposed appellant.

D. L. McCarthy, K.C., for the plaintiff Patton, respondent: The Court has an inherent power to prevent abuse of its process: *Haggard v. Pelicier Frères*, [1892] A.C. 61, at 67; *Lawrance v. Norreys* (1890), 15 App. Cas. 210. Had the Legislature intended that no discretion should be exercised on a motion to admit an appeal, the matter could be disposed of by an administrative officer of the Court.

The present application is not made in good faith. The appellant gave evidence in another action, supporting the title of another person to some of the shares in question, and was present in the Privy Council when the appeal of that person was dismissed. He now seeks to reassert his own title, and no indulgence should be granted to him. *Bowman v. Panyard Machine and Manufacturing Co.*, [1928] S.C.R. 63.

J. R. Cartwright, K.C., in reply: The case of *R. v. Hayes*, *supra*, is distinguishable, since that was a decision by the Court to which the appeal lay; it might be that the Privy Council might dismiss our appeal because it was brought too late, but this Court has no jurisdiction to do so, or to limit the time, which is not limited by statute. This Court has very wide powers, under s. 106(2)(d) and (g) of The Judicature Act, R.S.O. 1937, c. 100, but it cannot restrict a right of appeal which is given by statute.

As to the death of some of the plaintiffs, this is a representative action, and if any plaintiff is living to carry on the action, it does not abate: *Lloyd v. Dimmack* (1877), 7 Ch. D.

398; *Alchin v. Buffalo and Lake Huron Railway Company* (1870), 2 Ch. Ch. 45; *Beatty v. Neelon* (1885), 9 O.R. 385.

Cur. adv. vult.

March 5th, 1942. MASTEN J.A.:—My brother McTague has so admirably expressed the conjoint views of all the members of the Court that I can add nothing and simply concur.

MCTAGUE J.A.:—This is an appeal from an order of the late Honourable N. W. Rowell C.J.O., dated the 14th day of June, 1937, refusing to admit an appeal by the defendant Treadgold to the Privy Council from the judgment of this Court dated the 1st day of May, 1934. The defendant Treadgold, having made a further payment of \$2,000.00 into Court in 1941, also is moving in the alternative to this Court in its original jurisdiction for an order admitting the appeal and approving the security.

The action was tried by Mr. Justice Davis, now of the Supreme Court of Canada, and by his judgment dated the 23rd day of June, 1933, it was directed that some 15,500 preference shares and upwards of 2,000,000 common shares of the Yukon Consolidated Gold Corporation Limited standing on the register of the Company in the name of Treadgold be cancelled subject to certain reservations in favour of one Harrison. Treadgold's appeal to the Ontario Court of Appeal from Davis J.A.'s judgment was dismissed, [1934] O.W.N. 321, [1934] 3 D.L.R. 400. It is from this judgment that Treadgold now seeks to appeal to the Judicial Committee.

On the 3rd day of April, 1934, Treadgold moved before Middleton J.A. to have his appeal admitted to the Privy Council; his motion was dismissed by order dated the 21st day of April, 1936, [1936] O.R. 308. Middleton J.A.'s reasons set forth two grounds for dismissal; first, that the security paid in was not proper because it had been paid in to further a joint appeal by Treadgold and the North Fork Power Company Limited and, the latter Company having determined not to be an appellant, the security was not good in an appeal to be prosecuted by Treadgold alone; and second, so many new rights having arisen on the strength of the finality of the judgment proposed to be appealed from, including those arising from a reorganization of the company under orders of this Court, it would be unjust

and inequitable that Mr. Treadgold should be facilitated in prosecuting his appeal after so long a delay. Leave to appeal from the order of Middleton J.A. was refused by Latchford C.J.A. on the 6th day of May, 1936. However, Treadgold did get his appeal before the Court of Appeal from Middleton J.A.'s order on the 2nd day of June, 1936, and his appeal was dismissed, but without prejudice to any further application which he might make after giving proper security. On the 14th day of June, 1937, having in the meantime secured an order from Macdonnell J.A. declaring that the North Fork Power Company Limited had no interest in the security, he once again moved before the late Chief Justice of Ontario to have his appeal admitted, and again his application was dismissed. In his reasons the learned Chief Justice considered he was bound by the decision of Middleton J.A. on the matter of delay. On the 22nd day of June, 1937, Treadgold obtained a further order, *ex parte*, from Rowell C.J.O., extending the time for appealing from the Chief Justice's order of the 14th day of June, 1937, until the expiration of 10 days after the final determination of a motion on behalf of one William Edward Martyn for payment out of Court of the sum of \$2,000.00 paid in as security for the proposed appeal of Treadgold and the North Fork Power Company Limited.

At the opening of the argument before us a motion was made to quash the appeal from the order of Rowell C.J.O., on two grounds: first, that it was late; and secondly, that it being an appeal from an interlocutory order, no appeal lay because the appellant had not obtained leave. In answer to the first ground the appellant relied on the order of Rowell C.J.O., of the 22nd day of June, 1937. We are all of the opinion that effect cannot be given to this contention. It appears that Mr. Martyn died in August, 1937, before any cross-examination could take place on his affidavit, a matter which had been arranged for at the time of the motion before Rowell C.J.O., on the 22nd day of June, 1937. The motion has never been revived since Mr. Martyn's death. We take the view that once Martyn died the extension provided for in the order of the Chief Justice came to an end and it was the appellant's duty to bring on his appeal within a reasonable time if he sought to rely on the learned Chief Justice's order. With respect to the second ground, we are all of the opinion that the order of Rowell C.J.O. refusing to admit the appeal is interlocutory and that leave is

necessary. The substantive matter of rights in this action is the matter that was dealt with by Davis J.A. in 1933, and by the Court of Appeal in 1934. What was in question before Rowell C.J.O. was an application to admit an appeal to the Privy Council in order that the substantive rights of the parties could receive further consideration. We think such an order is in its nature collateral and procedural and, therefore, interlocutory. A review of the cases convinces us that such an order has always been considered interlocutory. This view was taken by Middleton J.A. in *Re Boulton and Toronto Terminals Railway Co. Ltd.*, [1933] O.R. 816, at 821, 41 C.R.C. 381, [1933] 4 D.L.R. 621, and in our opinion is not in conflict with *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580. The fact that in the case at bar the Court of Appeal heard the appeal from the order of Middleton J.A., after leave had been refused by Latchford C.J.A., has little significance because the appeal was dismissed. At any rate in the matter before us we must meet the issue squarely, which we do by holding that leave must be obtained before an appeal lies. Accordingly on this branch of the appeal we give effect to the preliminary objection and quash the appeal from the order of Rowell C.J.O. on the two grounds that it is late and that no leave was obtained.

On the alternative motion, preliminary objection was also made on the ground that such an application must in the first instance be made to a single judge and not to the full Court. Reading s. 2 and s. 10 of The Privy Council Appeals Act, R.S.O. 1937, c. 98, together, we are all of the opinion that such a motion properly lies to the full Court. In this connection we adopt the reasoning of Macdonnell J.A., in *Lovibond v. Grand Trunk Railway Co. of Canada*, [1934] O.R. 729, at 747, 43 C.R.C. 38, [1935] 1 D.L.R. 179.

In view of Mr. Cartwright's able argument on the bare construction of the statute, that once an applicant has established that the subject matter of the action falls within s. 1, the Court has no alternative but to admit the appeal upon proper security being furnished, we feel bound to express our views on what is the proper function of the Court acting under the statute.

There is no doubt that before the statute, or its first predecessor, was passed, there was a right of appeal to the Privy Council. We find in the Royal Proclamation of the 7th October, 1763 that after providing for the establishment as soon as prac-

licable of general assemblies within the colonies referred to in the said proclamation this provision:

“And in the mean time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in, or resorting to our Said Colonies [including Canada] may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England; for which Purpose We have given Power under our Great Seal to the Governors of our said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England, *with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all Civil Cases, to appeal, under the usual Limitations and Restrictions, to Us in our Privy Council.*”

The history of the legislation is fairly fully dealt with in *McBride v. Ontario Jockey Club Ltd.*, 58 O.L.R. 267, [1926] 1 D.L.R. 743, the very interesting judgment of Middleton J.A. We refer also to Professor Kennedy's book of Constitutional Documents. From this we conclude that s. 1 of the Act is essentially restrictive, limiting the right of appeal rather than creating it. Far from the Court being a mere rubber stamp or a purely administrative body, we are quite definitely of the opinion that its bounden duty is to exercise its functions judicially, and that its well-known general inherent jurisdiction is still its prerogative. The Act does not purport to take it away, and its function as a *Court* cannot be taken away by implication. S. 1 deals only with the subject matter of the action. It does not deal with the status of the appellant. If Mr. Cartwright's contention were sound, a lunatic so found, or an infant, or a person who has expressly renounced his right of appeal, or one who has forfeited his right by his conduct, would have an absolute right of appeal. We do not so hold. There is no such thing as an absolute statutory right where the Court is concerned. The Court always has the right to control its own process. It can always prevent fraud or abuse, or examine into the status of those who invoke it.

Altogether aside from the principle involved, there is a very important point of practice. Once this Court has admitted an

appeal, it is doubtful if the Privy Council would permit the matter which had been before us to be gone into again. The appellant would then be before the Judicial Committee as of right with a record certified by this Court, perhaps dealing only with matters which had occurred up to the date of the judgment of the Court of Appeal and the order admitting the appeal. In our view this would be an imposition on the Privy Council, which expects, and has a right to expect, a judicial consideration from this Court on any motion to admit an appeal. In *Davis v. Shaughnessy*, [1932] A.C. 106, [1932] 1 W.W.R. 407, [1932] 1 D.L.R. 417, Viscount Dunedin, after quoting from the reasons delivered by Lord Macnaghten in *E. W. Gillett & Co. Limited v. Lumsden*, [1905] A.C. at 602, put the matter thus:

“Their Lordships wish to repeat what Lord Macnaghten said as to its being the duty of the Court to come to a conclusion and either to allow the appeal or not. If they allow it, the result usually will not be questioned. If they do not allow it, then the wishful appellant can always present a petition for special leave to appeal, although, of course, it does not at all follow that such petition will be necessarily successful, as special leave to appeal is a matter of discretion and not of right.”

It is very clear on the material before us that great changes in the positions of the parties, and important new rights and obligations, have grown up on the strength of the finality of the judgment of the Court of Appeal of the 1st day of May, 1934. Almost eight years have elapsed. In these circumstances if the appellant wishes to get his appeal before the Privy Council he must persuade their Lordships on a motion for leave that this Court was wrong in dismissing his motion to admit his appeal and in quashing his appeal from the order of the Chief Justice of Ontario. We all think that the orders of Middleton J.A. and of Rowell C.J.O. were clearly right. The respondents will, of course, have their costs.

GILLANDERS J.A. agrees with MCTAGUE J.A.

Appeal and motion dismissed with costs.

Solicitor for the plaintiffs, respondents: D. L. McCarthy, Toronto.

Solicitor for the defendant Treadgold, appellant: W. L. Wallace, Toronto.

Solicitors for the other defendants, respondents: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

[COURT OF APPEAL.]

Melbourne v. McQuesten et al.

*Courts—Inherent Powers—Preventing Oppressive Working of Process.
Costs—Security—Praecipe Order—Setting aside—Application after Four
Days—Rules 176, 217, 373-376.*

The powers of the Court are not interfered with by the Rules of Practice, but remain untouched, and one of the essential powers inherent in the Court is that of preventing its process being made to operate so as to be oppressive as to anyone within its jurisdiction. A motion was made to set aside a *praecipe* order for security for costs. The motion was launched more than four days after the taking out of the order, and it was contended that it was too late, under Rule 217. *Held*, without considering the regularity of the proceedings below, the Court had an inherent power to set aside the order if it would be oppressive in its working. Since the circumstances were such that it would be unjust to require security from the plaintiff, the order was properly set aside.

AN appeal by special leave from an order of McFarland J. dismissing an appeal from an order of The Assistant Master setting aside a *praecipe* order for security for costs.

The plaintiff's residence was stated on the writ to be in the State of Ohio. The statement of claim contained the following paragraph describing the defendants:

"2. At all relevant times the Defendant McQuesten was Minister of Highways for Ontario and also a member and Chairman of the Niagara Falls Bridge Commission, a corporation created by the legislative Act of the Congress of the United States of America, and the Defendant Richardson was Chief Property Valuator and an official of the Department of Highways for Ontario."

The following statement of facts is taken from the judgment of Henderson J.A.:

"The plaintiff alleges that she is, and has, at all relevant times, been, the owner of certain lands in the City of Niagara Falls, described in the writ of summons, which are said to be of very considerable value. She alleges that the defendant McQuesten caused to be registered a plan showing her lands, among others, to have been expropriated or acquired for highway purposes under the provisions of The Highway Improvement Act, R.S.O. 1937, c. 56.

"She further alleges that the defendant Richardson caused to be delivered to her two notices signed by him dated April 18th, 1940 and May 6th, 1940, notifying her of the registration of the plan, alleging that such registration operated as expropriation

of the lands for the purposes of a highway, and demanding possession by May 21st, 1940. She further alleges that the alleged expropriation was not to acquire her lands for a highway or other lawful purpose, but in order that there might be constructed thereon part of an international bridge across the Niagara River and other structures and facilities in connection therewith.

"There are other allegations which need not be enumerated here.

"Accordingly the plaintiff issued a writ on May 13th, 1940, claiming a declaration that the Minister of Highways has no legal right or authority in the matter, and that the registration of the plan and the giving of the notices were illegal and void, and ineffectual to expropriate or affect the title of the property and asking for an order directing rectification of the register, for a mandatory order for possession, and for an injunction restraining the defendants McQuesten and Richardson from interfering with the plaintiff's peaceable possession and use of the said lands.

"It is common ground that the Honourable T. B. McQuesten is sued in his private capacity and not as a Minister of the Crown.

"The plaintiff moved for an injunction against the defendants McQuesten and Richardson, restraining them from entering upon or attempting to enter upon or take possession of her lands, and this application came before the Honourable Mr. Justice Greene and was dismissed by order dated May 27th, 1940 [noted in [1940] O.W.N. 311]. An appeal was taken from this order to the Court of Appeal, and was dismissed by order of the Court of Appeal dated the 24th of June, 1940.

"As I have already said, the plaintiff instituted the action by writ issued May 13th, 1940, and delivered her statement of claim on the 14th day of October, 1941.

"On October 20th, 1941, the defendants took out a *praecipe* order for security for costs, which was duly served on the following day, namely October 21st, 1940.

"On the 24th of November, 1941, the plaintiff moved before the Assistant Master for an order rescinding the *praecipe* order for security for costs, and by his order of the 3rd day of December, 1941, the learned Assistant Master set aside the *praecipe* order An appeal was taken from the order of the learned

Assistant Master, and was heard by my brother McFarland, who upheld the order and dismissed the appeal."

In addition to the above relief, the plaintiff claimed a declaration that The Highway Improvement Act, R.S.O. 1937, c. 56, was inapplicable in the circumstances, and that s. 57a of the Act, enacted by 1939, c. 19, s. 4, was *ultra vires*, and the Attorney-General for Ontario was also a party defendant.

November 24th, 1941. The motion to set aside the *praecipe* order was heard by THE ASSISTANT MASTER (O. E. Lennox Esq.) in Chambers at Toronto.

Everett Bristol, K.C., for the plaintiff, applicant.

G. A. Gale, for the defendants, respondents.

December 3rd, 1941. THE ASSISTANT MASTER:—Motion on behalf of the plaintiff to rescind a *praecipe* order for security for costs taken out on the 20th of October, 1941. Before being served with notice of motion, but on the same day, the defendants obtained an *ex parte* order dismissing the action with costs. This has since been set aside.

In support of the motion the plaintiff submits that she has assets within the jurisdiction sufficient to answer for all costs. The motion is first opposed on the grounds of delay, and I am referred to Rule 217:

"217. A party affected by an *ex parte* order, or any party who has failed to appear on an application through accident or mistake, or insufficient notice of the application, may move to rescind or vary the order before the Judge or officer who made the same, or any Judge or officer having jurisdiction, within four days from the time when the order comes to his notice."

In my opinion a *praecipe* order for security for costs is not an *ex parte* order within the meaning of the Rule. It is merely a right established by the Rules and neither the wording of the Rule itself nor its obvious purpose would appear to include a demand for security such as this.

The question what, if any, time limit is fixed by the Rules for hearing this type of application is seemingly settled by Rules 373 *et seq.*, governing the matter of security. Rule 376 provides:

"376. Upon default in giving security the action may upon an *ex parte* application be dismissed with costs."

In all Rules "may" means "may or may not" and gives the Court a discretion. *Attorney-General v. Emerson* (1889), 24

Q.B.D. 56. From this it seems clear that a discretion exists, at least up to the making of the application. The discretion might very well have been exercised in this case by directing notice to be served on the plaintiff and thus affording her an opportunity of making the same representation which she has now made by other means.

The Court should guard against unduly hampering a foreign plaintiff. The history of this action so far indicates that the question of security has not been uppermost in the minds of the litigants. The writ was issued in May, 1940. Then followed an application for an interim injunction, and thereupon interlocutory proceedings, including an appeal to the Court of Appeal, assumed major proportions. The statement of claim was delivered in October last, which was followed by the application for the order in question.

In dealing with the merits of the application, the more baldly the facts are stated the clearer the point of procedure should be. The Province of Ontario seeks to expropriate certain lands belonging to the plaintiff, the value of which lands is unquestionably far in excess of the amount of any possible costs. The Province, of course, submits to compensate the owner after the value of the land has been determined by the proper tribunal. The right to expropriate, however, is challenged in this action, in which the plaintiff seeks a declaratory judgment and injunction. It is patent on these facts that the security will not disappear whatever is the outcome of the action. If the plaintiff's contention fails, the Province will still be her debtor in a substantial amount so that the security is here in this Province under the control of at least one of the defendants.

The objection is taken, however, that the Honourable Mr. McQuesten (the Minister of Highways) and his deputy are sued in their personal capacities and not as officers of the Crown, and have no protection as to costs, as monies in the possession of the Crown cannot be attached. This contention cannot prevail. The plaintiff has so constituted her action for reasons which need not be considered here. She seeks a declaratory judgment which in no way affects the defendants in their personal capacities. They are involved in the proceedings only by virtue of their office, and on this basis they are incurring costs. The defendants are acting in a common interest and have appeared by the same solicitors. They have not severed their interests

in the protracted proceedings already taken. They are thus in no different plight than other defendants in like circumstances. The disabilities suggested by counsel are of their own making, if they do exist, the remedy is under their control, and cannot fairly be advanced to the prejudice of this plaintiff.

It is still open to the Court under the provisions of Rule 376 to exercise a discretion and consider at this stage the merits of the demand for security. The circumstances of this case indicate that the merits should be reviewed. The facts here disclose that there is ample security available whatever is the outcome of the action. If the plaintiff fails and her lands are expropriated, she is still entitled to a substantial amount by way of compensation, which is available and is in fact under the control of one of the defendants to answer for any possible award of costs against the plaintiff.

The *praecipe* order for security for costs will be set aside. The costs of the motion should be in the cause.

The defendants appealed from the order of the Assistant Master, and the appeal was heard by McFarland J., who dismissed it, adopting the reasons of the Assistant Master, on December 13th, 1941. Leave to appeal to the Court of Appeal was granted by Mackay J. on January 13th, 1942.

February 2nd, 1942. The appeal was heard by RIDDELL, HENDERSON and McTAGUE JJ.A.

R. L. Kellock, K.C., for the defendants, appellants: The *praecipe* order was an *ex parte* order within the meaning of Rule 217: *Broom v. Pepall* (1911), 23 O.L.R. 630, at 634, and the plaintiff's motion was therefore made too late, under Rule 217, and should have been dismissed: *Re Dominion Shipbuilding and Repair Co. Ltd.*, 59 O.L.R. 89, at 93, 7 C.B.R. 349, [1926] 3 D.L.R. 274; *Re Minehan*, 59 O.L.R. 389, at 391, [1926] 4 D.L.R. 969. Rule 376 has no application to a motion to set aside an order for security for costs, and confers no discretion on such a motion. The only discretion under Rule 376 relates to an extension of time for furnishing security, but it does not apply here. The time for moving against the order might have been extended under Rule 176, but that was not in fact done. There was no case made, on the materials, for such an extension: *Hewett v. Barr*, [1891] 1 Q.B. 99; *Alropa Corporation v. Holdcroft et al.*, [1938] O.W.N. 498, at 500.

As to the second ground upon which the Assistant Master proceeded, the onus is on a foreign plaintiff to establish the ownership of property within the jurisdiction which would be forthwith available to the defendants in execution: *Daniel v. Birkbeck Loan and Savings Co.* (1905), 5 O.W.R. 757; *Welsbach Incandescent Gaslight Company v. St. Leger* (1895), 16 P.R. 382, at 384. If the plaintiff is unsuccessful in the action, the lands will be vested in the Crown and the plaintiff will have a claim for compensation, which is not exigible at all, and would not be an asset which would entitle a foreign plaintiff to be relieved from the necessity for giving security: *Richardson v. Elmit* (1876), 2 C.P.D. 9; *Boyd v. Haynes* (1869), 5 P.R. 15; *Central Bank v. Ellis* (1896), 27 O.R. 583,

Everett Bristol, K.C., for the plaintiff, respondent: Whether or not a *praecipe* order under Rules 373 *et seq.* is to be considered an *ex parte* order within the meaning of Rule 217, the Assistant Master had and exercised a discretionary right, under Rule 176, of enlarging the time for applying to set aside the order. Having regard to the difficulties and delay in receiving instructions from a non-resident plaintiff, and the other circumstances disclosed in the material, such discretion was properly exercised.

No other case goes as far as *Welsbach Incandescent Gaslight Company v. St. Leger*, *supra*.

I refer also to *White v. White* (1859), 1 Ch. Ch. 48; *Re Carroll* (1868), 2 Ch. Ch. 305; *Bready v. Robertson* (1890), 14 P.R. 7, at 10.

Cur. adv. vult.

March 9th, 1942. RIDDELL J.A.:—The plaintiff was the owner of a valuable tract of land near the Niagara River. This being required for public purposes, it was made the property of the Crown under The Highway Improvement Act, R.S.O. 1937, c. 56, s. 55, due notice being given under s. 60. The plaintiff, contending that such expropriation was illegal, brought an action against the Attorney-General of the Province, the Minister directing the expropriation and the Chief Property Valuator. As she resided out of the Province, the defendants obtained an order for security for costs on October 20th, 1941. No application was made to set this aside within the time fixed by the Rule 217, though it had been served promptly. On an application subsequently made, the Assistant Master, on Decem-

ber 3rd, 1941, set the order aside; and his order was affirmed by Mr. Justice McFarland on December 13th, 1941. Leave to appeal having been granted by Mr. Justice Mackay on January 13th, 1942, the appeal was argued before us. I do not think it necessary to inquire into the regularity of the proceedings or to express any opinion not necessary in my judgment to decide this appeal.

I am unable to come to the conclusion that the only method of having an order such as this disposed of is that provided by the Rules. I am of the opinion that the powers of the Court are not interfered with, but remain untouched, and one of the essential powers inherent in the Court is that of preventing its process being made to operate so as to be oppressive on anyone within its jurisdiction.

In this action the defendants are sued because of acts done as servants of the Crown—the Crown it is, which is in fact though not in form attacked, and it is, of course, plain that the Crown will in fact pay any expense to which the defendants may be put.

There might be one of three results in this action. The action might be successful, in which case the defendants would not be entitled to costs; it might fail, but the trial judge under the circumstances might not award costs to the defendants; or it might succeed and costs may be awarded against the defendants. In the last mentioned case, of course, the Crown would pay the costs, as the action is in substance against the Crown.

Now, the Crown is in possession of very valuable property taken from the plaintiff, and has not paid the plaintiff for it. In reality the Crown has much valuable assets, to which the plaintiff is entitled. Would it not be unjust under these circumstances to compel her to put up additional security, when the Crown has large assets from which the money due may be deducted?

I would dismiss the appeal. The costs throughout may well be left to the discretion of the tribunal which disposes of the rights of the parties. We need not, I think, say anything of the proceedings below, disposing, as I think we should, solely upon the inherent power of the Court.

HENDERSON J.A., dissenting (after setting out the facts as above, and quoting from the judgment of the Assistant Mas-

ter):—In my opinion the learned Assistant Master is wrong and a *praecipe* order for security for costs is an *ex parte* order. . . .

It is to be noted that the motion on behalf of the plaintiff to rescind the *praecipe* order for security for costs was not made until some considerable time after the time for appealing therefrom had expired, and after the security, under the terms of the order should have been furnished. Doubtless there was power to extend the time, but nothing appears on the material, to indicate that any such order was made.

It is said that security for costs should not be ordered because, under the statute, if the plaintiff fails in her action and owes costs to the defendants, she will become entitled to compensation for her lands, which compensation is to be paid by the Minister of Highways or upon his order. The point is a narrow one, but the fact is that if the plaintiff becomes entitled to compensation, the compensation will be payable to her by the Crown, and the Honourable T. B. McQuesten, if he is then Minister of Highways, would have no legal right to attach moneys owing to the plaintiff by the Crown for costs owing to him or his co-defendants in their private capacities.

Having in mind the fact that the plaintiff delayed sixteen months after the injunction proceedings were terminated before filing a statement of claim, and is in default in connection with the order for security for costs, I think the defendants are entitled to stand upon their legal rights and in that view they are, in my opinion, entitled to same.

The appeal should therefore be allowed with costs of this appeal and of the appeal below, and of the motion before the Assistant Master, and the order for security for costs should be reinstated with the provision that it must be complied with within a period of two weeks from the date of this judgment.

MCTAGUE J.A. agrees with RIDDELL J.A.

Appeal dismissed, HENDERSON J.A. dissenting; costs to be disposed of at trial.

Solicitors for the defendants, appellants: Mason, Foulds, Davidson & Kellock, Toronto.

Solicitors for the plaintiff, respondent: White, Ruel & Bristol, Toronto.

[GILLANDERS J.A.]

Rex ex rel. Smith v. Martin.

Trades and Trade Unions—Industrial Disputes—Illegal Strike—The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112—Extension of Application of Act—Effect of Orders in Council 3495 (November 7th, 1939) and 4669 (September 11th, 1940)—Defence of Canada Regulations, Part I, Regulation 2, s. 1(d).

Criminal Law—Stated Case—Effect of Magistrate's Delay—The Criminal Code, R.S.C. 1927, c. 36, s. 761.

Order in Council No. 4669, of September 11th, 1940, which declares certain plants to be "essential services" within the meaning of para. 1(d) of Regulation 2 of the Defence of Canada Regulations, does so expressly with a view to assisting the civil authorities in the enforcement of the provisions in those Regulations dealing with defence, by preventing espionage, sabotage, and similar activities. The Order in Council, however, does not declare the work carried on in the plants in question to be among those specified in Order in Council 3495, of November 7th, 1939, which extended the provisions of The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112. Order 4669 declares the plants to be essential services on the basis that they are essential "to the life of the community", rather than essential "for the prosecution of the war". Accordingly, the Act does not apply, under Order 3495, to a plant to which it would otherwise be inapplicable, merely because that plant is among those mentioned in Order 4996.

The fact that a magistrate fails to state a case within three months of the application, as required by s. 761(3)(b) of The Criminal Code, R.S.C. 1927, c. 36, does not deprive the appellant of his right to proceed. *Rex v. Ritholz Optical Co. Ltd.*, 63 C.C.C. 212, [1935] 1 D.L.R. 681, applied.

AN appeal, by way of a case stated, from a conviction made by a police magistrate at Toronto, for a breach of The Industrial Disputes Investigation Act, R.S.C. 1927, c. 112.

November 21st, 1941. The appeal was heard by GILLANDERS J.A. in Chambers at Toronto.

J. L. Cohen, K.C., for the appellant.

J. C. M. German, K.C., for the respondent.

December 19th, 1941. GILLANDERS J.A.—This is an appeal by way of stated case from the order of Robert Forsyth, a police magistrate in and for the City of Toronto, convicting the appellant, who was charged under the provisions of the Industrial Disputes Investigation Act, R.S.C. 1927, c. 112, as follows, that he did "on the 4th day of June in the year 1941 at the City of Toronto in the County of York unlawfully go on strike contrary to the provisions of the Industrial Disputes Investigation Act 1927 and Amendments thereto and were on such strike on the 5th, 6th, 7th, 9th, 10th and 11th days of June 1941 in contravention of the said Act, Sections 57 and/or 58."

The magistrate convicted the accused, and, at the request of counsel for the accused, stated a case for the opinion of this Court. The case stated, in part, reads as follows:

"3. At the opening of the trial Counsel for the accused objected to the Information on the ground that it covered several distinct offences and not one continuing offence. I refused this objection. Was I right?

"4. The facts of the case are as follows:

"The Canadian General Electric Company Limited carries on operations at the City of Toronto where it conducts two plants, one at Davenport Road and Lansdowne Avenue, known as the Davenport plant, and one at Ward Street, known as the Ward Street plant. It is engaged in the manufacture of electrical supplies.

"The accused with other employees of the Davenport Plant were members of the United Electrical, Radio and Machine Workers Union of America. In June, 1941, immediately prior to the 4th day of June, 1941, the company was requested on behalf of such employees, including the accused, to recognize and deal with the said Union and its representatives with respect to wages and hours of work for the employees. This request was not complied with.

"By Order-in-Council 4669, September 11, 1940, (filed as Exhibit No. 2) the Davenport plant was declared an essential service within the meaning of the Defence of Canada Regulations. By Order-in-Council 3495 dated 10th March, 1941, [*sic**] (filed as Exhibit No. 1) the scope of The Industrial Disputes Investigation Act was extended. No conciliation board was applied for under the Industrial Disputes Investigation Act. At 12 o'clock noon on the 4th day of June, 1941, the accused and five or six hundred employees of this plant ceased work and left the plant. They did not return to work until June 13th.

"5. I found as follows:

"(a) That the dispute between the employees and the employer was a dispute within the meaning of the Act.

"(b) That the Davenport branch of the Canadian General Electric Company Limited came under the provisions of the Act.

* This date is apparently an error in the stated case. Order in Council No. 3495 was dated November 7th, 1939, and is so referred to in the judgment, *infra*.

“(c) That the accused went on strike and continued on strike contrary to the provisions of the Act.

“Was I right in so finding?

“6. On behalf of the accused it was contended,

“1. That the Information upon which I convicted the accused was defective on the ground that it charged more than one offence.

“2. That there was no evidence that the accused went on strike on the day alleged in the Information.

“3. That there was no evidence that the accused remained or went on strike during the other days alleged in the said Information.

“4. That it was not established that The Industrial Disputes Investigation Act, as extended by P.C. 3495, applied to the works of Canadian General Electric Company Limited at which the accused was alleged to be employed on the day or days in question.

“5. That the matter was not a dispute falling within the said Industrial Disputes Investigation Act.

“6. That the accused was not, in law, rightly convicted by me.

“7. I being of the opinion that the accused went on strike and continued on strike in contravention of the Act found the accused guilty of the charges laid.

“8. The question for the opinion of the Court is whether upon the above statement of facts the said determination was correct in point of law and what should be done in the premises.”

Preliminary objection was raised by counsel for the respondent that the Court is without jurisdiction by reason of the fact that the case was not stated within three calendar months after the date of the application, as provided by section 761(3)(b) of the Criminal Code, R.S.C. 1927, c. 36, which applies in this case.

It is admitted that while in fact the application for the stated case was made on July 19th, 1941, and the three months expired on October 19th, the case was not stated until November 8th.

“The conditions prescribed by this section are conditions precedent to enable the Court to hear the appeal only so far as it relates to the acts to be done by the appellant, and it has been held that they are not imperative but only directory as to the

acts of the Magistrate": per Hope J. in *Rex v. Ritholz Optical Co. Ltd.*, 63 C.C.C. 212, [1935] 1 D.L.R. 681; see also *Hughes v. Wavertree Local Board* (1894), 10 T.L.R. 357, and *Lockhart v. Mayor, Aldermen, and Citizens of St. Albans* (1888), 21 Q.B.D. 188. Effect should be given to this principle here.

As to the question whether or not the information in this case covers more than one offence, the appellant makes two submissions: (1) that the charge of going on strike is one offence, and (2) that the charge that the appellant was on such strike on the several days named thereafter constitute charges of subsequent offences.

The charge is not open to objection on this ground. The gist of the offence is going on strike. This is a continuing offence, and the statement of the days during which the appellant was on strike is merely further descriptive of the offence charged. It may be a matter to be considered in fixing the penalty to be imposed under s. 60 of the Act, but it does not have the effect of charging more than the one offence.

The appellant's counsel further submits that the charge is bad as being in the alternative by reason of the fact that it is stated to be "in contravention of the said Act, sections 57 and/or 58". This submission will bear examination.

S. 57 in effect makes it unlawful for an employee to go on strike on account of any dispute, prior to, or during, a reference of such dispute to a Board.

S. 58 is apparently limited to a dispute arising from a desired change, affecting conditions of employment with respect to wages or hours, and makes it unlawful for employees to go on strike until the dispute has been finally dealt with by a Board.

Counsel submits that while the disputes covered by s. 57 might arise from some matter other than one respecting wages or hours, for instance one under s. 2(d)(v), in reference to materials supplied, s. 58 is limited to a dispute respecting conditions of employment with respect to wages and hours, and that the accused is therefore left in doubt in respect of the exact charge or charges being made and that the information is therefore bad.

The common essential feature of ss. 57 and 58 is the compulsory postponement of a strike or lock-out until a Board has had the opportunity of acting in accordance with the provisions of the Act.

In this case I think s. 725 of the Code may be applied; that only one offence was charged, that the appellant was not in any way misled, nor has he been under any doubt as to the offence with which he was charged, nor is he now in any way prejudiced, and that the charge should not be held objectionable on the ground stated.

Dealing with the submission that there was no evidence that the accused went on strike, the relevant facts as set out in the stated case show in brief that the accused was a member of the Union mentioned, that immediately prior to the strike the company was requested on behalf of the members of the Union to recognize and deal with the Union, but that no action was taken on this request; and that the accused with five or six hundred other employees left at 12 o'clock noon on June 4th and did not return to work until June 13th. In a civil proceeding there would be no difficulty in drawing from these facts the inference that the accused went on strike, but it is urged that in a proceeding of this nature this is no evidence in law on which a conviction can be based; that it is not inconsistent with innocence and that this is a question of law. "Strike" and "go on strike" are defined in s. 2(k) of the Act. Taken with other surrounding circumstances, the fact that this accused left at the same time as five or six hundred other employees of the plant, remained away during the same time and returned with these employees some days later, is, I think, quite sufficient to support the conclusion that the accused ceased work, acting in combination with the others taking the same action, and on which to base a finding that he went on strike, as found by the magistrate.

I deal next with the submission that it is not established that the Act applies to the dispute in question, or the plant where the accused was employed. The magistrate has found that the Daventry Branch of the Canadian General Electric Company Limited came under the provisions of the Act, and if there is any reasonable evidence as disclosed in the facts to support this finding, it is not subject to review here.

As provided by s. 761 of the Code, the question involved is whether the conviction is erroneous in point of law, and while the weight of the evidence (where there is evidence) is not a matter to be dealt with on a stated case, the question whether or not there is an absence of legal evidence to support the finding is a matter of law to be considered. *Regina v. Lloyd* (1890),

19 O.R. 352; *Regina v. Winslow* (1899), 3 C.C.C. 215, 12 Man. R. 649; *Rex v. Howe* (1913), 24 C.C.C. 215, 42 N.B.R. 378.

I take it that the conclusion of the magistrate that the works in question come under the provisions of the Act is based on the statement in the stated case that "By Order-in-Council 4669, September 11, 1940, (filed as Exhibit No. 2) the Davenport Plant was declared an essential service within the meaning of the Defence of Canada Regulations. By Order-in-Council 3495 dated 10th March, 1941, [*sic**] (filed as Exhibit No. 1) the scope of the Industrial Disputes Investigation Act was extended."

It is submitted that the Orders-in-Council mentioned and the Defence of Canada Regulations do not have the effect of bringing the premises in question under the provisions of the Act.

Defence of Canada Regulations, Part I, Regulation 2, para. 1(d) (1941 Consolidation), defines "essential services" for the purpose of the Regulations as meaning, *inter alia*,

"vi. Any undertaking which may have been heretofore or may hereafter be declared by the Governor in Council to be essential for the prosecution of the war or to the life of the community."

Order in Council 4669, after making reference to the above Regulation, recites that it has been represented that a declaration to the effect that certain plants, including among others the Davenport Works of The Canadian General Electric Company, Limited, are essential to the life of the community, would enable the civil authorities to enforce certain provisions of the Defence of Canada Regulations. The provisions in question relate to trespassing and loitering on or near the premises, and those regulations which prohibit the doing of any act with intent to impair the efficiency or impede the working of any undertaking engaged in the performance of such services. The Order in Council, "with a view to assisting the civil authorities in the enforcement of the Defence of Canada Regulations", declares the said plants to be essential services within the meaning of subpara. (d) of para. (1) of Regulation 2.

These regulations have to do with various matters of defence, preventing access to certain premises and areas to prevent espionage, sabotage and various other activities and matters.

* This date is apparently an error in the stated case. Order in Council No. 3495 was dated November 7th, 1939, and is so referred to in the judgment, *infra*.

It is apparently conceded that the Industrial Disputes Investigation Act, as it stood prior to November 7, 1930, would not extend to cover a dispute in the plant in question.

By Order in Council 3495, dated November 7th, 1939, "under and in virtue of The War Measures Act (Chap. 206, R.S.C. 1927)", His Excellency the Governor General in Council "is pleased to order and it is hereby ordered that the provisions of the Industrial Disputes Investigation Act (Chap. 112, R.S.C. 1927), other than section 64 thereof, shall specifically apply in respect of any dispute between employers and employed engaged in the construction, execution, production, repairing, manufacture, transportation, storage or delivery of munitions of war or supplies, and in respect also of the construction, remodelling, repair or demolition of defence projects, as hereinafter respectively defined, intended for the use of His Majesty's naval, military or air forces or for the use of the forces of any of His Majesty's allies in the present war."

The Order proceeds to define "munitions of war" and "supplies" and "defence projects".

"Supplies" is defined as including: "materials, equipment, ships, aircraft, automotive vehicles, goods, stores and articles or commodities of every kind including, but not restricting the generality of the foregoing (i) articles and equipment which, in the opinion of the Minister of Labour, would be essential for the needs of the Government or of the community in war; and (ii) anything which, in the opinion of the Minister of Labour, is, or is likely to be, necessary for or in connection with the production, storage or supply of any such article as aforesaid".

Order in Council 4669, while it declares the plant in question to be an essential service with a view to assisting the civil authorities in the enforcement of The Defence of Canada Regulations, does not declare the plant in question or the work, undertaking or business of the company there carried on to be among those specified in Order in Council 3495, which Order in Council extends the provisions of the Industrial Disputes Investigation Act.

It should be noted that Order in Council 4669 is based on the provision in Regulation 2(d) (vi) that the service is essential "to the life of the community" and makes no reference to that part of the same clause under which it might be declared essential "for the prosecution of the war". Nor is it based on the previous

clause: v. "any mining or industrial undertaking engaged in the production of war materials or supplies". If it had been so based, I would think it then was within the provisions of Order in Council 3495.

In view of the fact that Order in Council 4669 makes no mention of the plant in question being engaged in the production, storage or delivery of such supplies, and in view of the fact that the Order, as stated, is made "with a view of assisting the civil authorities in the enforcement of the Defence of Canada Regulations," I am unable to conclude that Order in Council 4669 brings the plant and dispute in question here within the provisions of Order in Council 3495 extending the provisions of the Industrial Disputes Investigation Act. I take it I am confined to the facts set out in the stated case, although I understand that no evidence was given as to the applicability of the Act to this plant other than the Orders in Council mentioned.

In my opinion there is no evidence in the stated case to support a finding that the plant in question here came under the provisions of the Act. I am somewhat reluctant so to conclude, and to have the appeal turn upon a somewhat technical point, and not upon its broader merits. However, if there is *no* evidence of the applicability of the Act in the case, I conceive this to be a question of law to which effect must be given.

It was also strongly argued that this type of dispute, that is, "to recognize and deal with said union and its representatives with respect to wages and hours of work for employees" is not within the provisions of the Industrial Disputes Investigation Act. "Dispute" is defined by s. 2(d) of the Act.

Construing the Act in the manner in which a penal statute of this nature should be construed, *i.e.*, so that no cases shall be held to fall within it which do not fall within both the reasonable meaning of its terms and express language and the spirit and scope of the enactment, it may be arguable whether or not the terms of the statute are sufficient to embrace a dispute as to the recognition of a trade union as a collective bargaining agent with respect to wages and hours. However, being of opinion, as previously stated, that there is no evidence on which a finding that the Act applies to this particular plant could rest, I think it unnecessary to express any opinion on this question here.

For the reasons stated, I am of opinion that the determination of the magistrate that on the facts stated the accused was guilty as charged must be reversed, and the conviction must be set aside.

Conviction reversed.

Solicitor for the appellant: J. L. Cohen, Toronto.

Solicitors for the respondent: German & Howard, Toronto.

[URQUHART J.]

Re Shipman Boxboards Limited.

Companies—Debentures and Bonds—Effect of Omission of Charging Clause in Debenture and Trust Deed—Equitable Mortgage—Debenture Holders Not Secured Creditors in Bankruptcy of Company—Limitations on Court's Power of Amendment—The Corporation Securities Registration Act, R.S.O. 1937, c. 264, ss. 2, 3, 4, 7, 8.

Bankruptcy—Effect of Trustee's Disallowance of Claim to Rank as Secured Creditor—The Bankruptcy Act, R.S.C. 1927, c. 11, ss. 24(2), 127.

A company issued debentures, which were sold to the public as constituting a floating first charge on the company's property. Through an oversight, neither the debentures themselves, nor the trust deed entered into by the company, contained any charging provision, although there was in the trust deed a covenant for further assurances. This omission was not discovered until debentures had been sold to a large amount. The company later became bankrupt, and the debenture holders claimed to be entitled to rank as secured creditors of the estate. *Held*, this claim could not succeed. Although all parties had understood that a floating charge had been created as security for the debentures, the fact remained that no such charge had in fact been created. The mere use of the word "debentures" did not constitute a charge. The circumstances were such as to create an equitable mortgage in favour of the debenture holders, but this did not make them secured creditors at the time of the bankruptcy. Nor was the Court's power of amendment, under ss. 7 and 8 of The Corporation Securities Registration Act, R.S.O. 1937, c. 264, wide enough to enable it to assist the debenture holders in this case. The effect of a purported disallowance, by the trustee in bankruptcy, of the claim of a creditor to rank as a secured creditor, was discussed, and the opinion was expressed that such action by the trustee could not be effective to deprive the creditor, if in fact he was secured, of his security.

AN issue directed by order of Urquhart J., to determine whether or not the holders of certain debentures of a bankrupt company were entitled to rank as secured creditors in the bankruptcy of the company.

The debtor company was incorporated in 1937, and became bankrupt in February, 1940. During the intervening period, debentures to the amount of \$67,500 were sold to the general

public, at first through a firm of brokers, and later by the company itself. The original borrowing resolution, and the form of debenture then drawn up, provided that the debentures should be secured by a first floating charge on all the company's property and assets, subject to certain restrictions. A form of prospectus was also approved, and permission to sell the debentures was obtained from the Securities Commission.

The solicitor for the company made certain filings with the Provincial Secretary, in purported compliance with The Corporation Securities Registration Act, R.S.O. 1937, c. 264, but by error he filed a copy of the first half of the prospectus only, and no copy of the proposed debenture.

For about one year, purchasers of debentures received only interim certificates, and no definitive debentures were ever issued in the form originally adopted. The solicitor for the trust company which was to act as trustee for the debenture holders, in drawing the form for the definitive debentures, followed a form which omitted to provide for any charge, and after the adoption of a new borrowing resolution the definitive debentures were finally issued in this form. The new resolution was adopted in February, 1939, and the trust deed was completed in the following month, and was registered with the Provincial Secretary, with an affidavit of *bona fides*, made on April 3rd, 1939. It was not until January, 1940, that any person concerned realized that no charge was in fact created by the debentures or the trust deed. A composition was entered into in May, 1939, under The Companies' Creditors Arrangement Act, 1933, 1932-33 (Dom.), c. 36, and in all the proceedings connected with this composition it was assumed on all sides that the debenture holders were secured by a charge.

The trust deed contained the following paragraph, among the covenants by the company:

"(j) That it will at any and all times do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered all and every such further acts, deeds, conveyances, hypothecs, mortgages, transfers and assurances in law, notices or memorials for registration as the trustee shall reasonably require for the better accomplishment and effectuation of the intentions of this Trust Agreement."

The company became bankrupt, and The Premier Trust Company, which was already acting as trustee for the deben-

ture holders, was appointed trustee in bankruptcy. In addition to the debenture holders and preferred creditors, there were unsecured creditors with claims amounting to \$42,000. The net amount realized by the trustee from a sale of the assets was approximately \$26,000.

The trust company, as trustee for the debenture holders, made a claim against itself as trustee in bankruptcy, claiming that the debentures were secured by a floating charge. This claim was disallowed by the company as trustee in bankruptcy, but the debenture holders were permitted to rank as ordinary creditors. There was no appeal from this notice of disallowance, partly because the trust company, as trustee in bankruptcy, notified all the creditors, by a letter dated August 6th, 1940, that it was its intention to apply before the Judge in Bankruptcy for an order as to the disposition of the proceeds of the sale, and that this application would deal particularly with the position of the debenture holders.

The application was duly made before Urquhart J., no one appearing for the debenture holders. One of the debenture holders was then appointed to represent the class, a direction was made that counsel should be appointed, and it was further directed that an issue should be tried to determine whether the debenture holders should rank as secured or as ordinary creditors, and that on the trial of the issue the presiding judge should also hear and dispose of an application by the debenture holders under s. 7 of The Corporation Securities Registration Act for an order rectifying the omission in the trust agreement of a clause creating a charge.

October 31st and November 1st, 1940. The issue was tried by URQUHART J. without a jury, at London.

Joseph A. Sweet, for the trustee in bankruptcy.

George T. Walsh, K.C., and *E. B. Stirling*, for the debenture holders.

December 6th, 1940. URQUHART J. (after setting out the facts):—

It was suggested in argument by Mr. Walsh that the word "debentures", and the fact that an elaborate trust document was drawn up, would denote security and that the holders of the debentures were actually in a position above that of ordinary creditors. In fact witnesses, and even the lawyers concerned

and trust company officers, used the words "bonds" and "debentures" interchangeably. In considering this argument we must look at the meaning of the word "debentures" itself. Chitty J. in *Edmonds v. Blaina Furnaces Company* (1887), 36 Ch. D. 215, at p. 219, says: "The term (debenture) in itself imports a debt—an acknowledgment of a debt—and . . . I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security. So that there are debentures which are secured, and debentures which are not secured."

In Words and Phrases, Vol. 11, p. 186, it is set forth that "The word 'debenture' does not of itself import a secured indebtedness."

Again, Murray's English Dictionary, Vol. 3, p. 79, defines a debenture as "a certificate of indebtedness", "an acknowledgment of indebtedness by a corporation, private person, etc.", and in other similar ways. A debenture is merely a specialty debt of a corporation. It may or may not be accompanied by security. In fact several series of debentures issued by large corporations in this Province, not having security behind them, come readily to my mind.

It is unfortunate, however, that the public in its mind, in many cases, regards debentures as creating security on the assets of a company. I think, therefore, there is nothing in the above argument.

The next argument of Mr. Walsh was that in equity a charge or mortgage was created.

Where the intention of the parties is to create a charge, as it obviously was in this case, but where the documents as drawn actually create no charge, in many cases an equitable mortgage is created.

Mr. Walsh in his argument relied on *Re Cadwell's Ltd.; Trustee v. Royal Bank*, [1934] O.R. 178, 15 C.B.R. 293, [1934] 2 D.L.R. 341. It seems to me, however, that that case is quite different from the present one and would not assist us in establishing the debentures here as an equitable charge. In that case the mortgage deed and bonds in question, which in fact created a charge, had been duly executed and registered under The Corporation Securities Registration Act and had

been duly assigned by the company to the Royal Bank but without the formal certification by the trustee as required by the mortgage deed. It held that the bonds actually did create a charge and as all parties concerned had been agreeable to the transfer without certification the bonds were good security in the hands of the Royal Bank, the holder, as against a trustee in bankruptcy.

However, in *Falconbridge on Mortgages*, 2nd ed., pp. 65-6, it is said: "An incorporated company having executed a bond, which contained no direct words of charge but was evidently intended to give a charge on the property of the company, it was held that the charge was sufficiently created." The case which the learned author of that work cites in support of that proposition, namely, *Town of Dundas v. Desjardins Canal Co.* (1870), 17 Gr. 27, uses the expression that the plaintiffs "have a lien under a bond". The bond is an ordinary condition bond for payment of money. *Mowat V.C.*, at p. 30, said in regard to it: "The bond shews beyond a question that the object of both parties was to give to the plaintiffs a lien; and the rule of equity is, that no formal instrument is necessary for that purpose, and that any writing from which the intent appears, is sufficient."

That case, however, differs to a great extent from the present, in that the bond itself appeared to contemplate security. It recited among other things the power to borrow and execute mortgages, that the plaintiffs were entitled to security, that the plaintiffs were desirous of more fully securing repayment of the loan and taking security and gaining the priority of a lien on the canal. Then the condition of the bond sets forth that the sums were advanced as aforesaid and that the company would do no act to prevent the plaintiff taking precedence and having a priority of lien on the canal. The bond appears to be an ordinary condition bond and there was no charging clause in it. In that case the equitable principle was applied as against the Government, which was an execution creditor. At that time, of course, there was no such Act in force as we have now in regard to registration of securities.

The circumstances in the case at bar fall far short of the circumstances in that particular case, but after a careful consideration of the matter I believe that the effect of the agree-

ment made between the company and Wismer, Harper & Company [the brokers] and the sale by them, and later by the company, to debenture holders, as evidenced by the prospectuses above referred to, was such as to create an equitable mortgage between the holders of the debentures and the company. Contracts were made between the company and Wismer, Harper & Company in the first place and between the company and the debenture holders direct later on, on that basis. The contracts were based on prospectuses issued and put in the hands of the public. The prospectuses were lodged with the Securities Commission and the permission of the Securities Commission to sell the debentures, on the basis of their creating a first floating charge on the assets, was given.

There are similar expressions to the *Dundas* case in the trust document itself, particularly at p. 16, clause "h" where the company guarantees that it "will not, while any of the debentures of the issue remain outstanding, unless thereunto authorized by Extraordinary Resolution of the debenture holders . . . create or issue any obligations of any kind secured upon the property or assets of the company, or any part thereof except for the purpose of giving security to its bankers . . . ," etc., and clause "j" above referred to, for further assurance. So I find that in fact an equitable charge was created by the issue of these debentures.

Mr. Sweet in his argument contends that the effect of the disallowance by the trustee of the claim of these debenture holders as secured creditors, and their not having appealed against the disallowance within 30 days, is that I cannot now, even if I had the power, raise the debenture holders out of the category of unsecured creditors into that of secured creditors by amending the trust document and debentures. He argues that at the moment of disallowance, and even at the date of the hearing, they were not *actually* secured creditors, and so their rights, if any, to have the document amended are destroyed by virtue of their not having appealed.

It is now too late to appeal against the notice of disallowance if effective and the Court has no power now to extend the time for appealing: *Re Glen Woollen Mills, Limited*, [1939] O.W.N. 126, 20 C.B.R. 162.

On the authorities I would not have the right to extend the time even if it in justice should be extended because of the dual

position of the Premier Trust Company in the matter, and also because of the above letter which they wrote on August 6th, 1940. Mr. Sweet's argument in this connection, though ingenious, is difficult to follow.

If a person is actually secured, then he could not be bound by a notice of disallowance of his security. For example, if he actually had a mortgage on the property he could pursue his own way and realize on the security. A mortgage would have to be attacked in another way and not by notice of disallowance. In my opinion the section of The Bankruptcy Act, R.S.C. 1927, c. 11, relative to disallowance of claims (s. 127) refers only to the claims of unsecured creditors or those claiming to rank on the estate, as where a secured creditor under-values his security and claims for the balance.

A secured creditor under s. 24(2) "may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it . . . unless the court otherwise orders." This right is subject to ss. 106 to 113 inclusive which deal with proof by secured creditors. There are no provisions in these sections for disallowance of a creditor's claim for security, thereby relegating him to the unsecured class.

Mr. Sweet merely means, I think, that the debenture holders having accepted the situation, the Court should not now, by supplying an omission in the document, or in the mode of registration, change the category of these debenture holders.

I do not think I can follow him in this and I can see no reason on that account why I should not amend the trust document and debentures under s. 7 of The Corporation Securities Registration Act, R.S.O. 1937, c. 264, if the circumstances make it just and proper for me to do so, particularly as I have found that an equitable charge has been created.

Having found that the effect of the sales and their circumstances is to create an equitable charge, to make good any kind of a charge against creditors, several formalities are required. If the charge is in the form of a trust deed to secure debentures, the instrument creating such charge must be filed in the Provincial Secretary's office within thirty days of execution and it must be accompanied by an affidavit of an officer of the corporation, the trust company in this case, that the charge was executed in good faith and for the purpose of paying the debentures

and not for the mere purpose of protecting the chattels involved against the creditors of the mortgagor. This was actually done in April, 1939, in the case of the trust deed in question. If, however, there is no separate instrument creating a charge then there must be filed an affidavit of an officer of the mortgagor who was cognizant of the facts stating:

- (a) the total amount secured by the debenture;
- (b) a true copy of the debenture, or one of the series; and
- (c) the date of execution.

In regard to the original resolution and debentures passed and authorized on February 21st, 1938, this was not actually done. What was actually done did not comply with the section.

I have in the above two paragraphs set out the requirements of ss. 2, 3 and 4, of The Corporation Securities Registration Act, R.S.O. 1937, c. 264. That Act goes on to provide that unless the above formalities are complied with, "Every . . . charge, whether specific or floating, of chattels . . . created by a corporation . . . contained . . . in a trust deed or other instrument to secure . . . debentures . . . shall be absolutely void as against creditors of the mortgagor . . .": S. 2(1).

S. 7(1) and s. 8 of the Act, however, give certain rights of amendment to the Court. They are as follows:

"7.—(1) Subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this section, a judge of the Supreme Court, on being satisfied that the omission to file an instrument or affidavit within the time prescribed by this Act or any omission or misstatement in any document filed under this Act was accidental or due to inadvertence or impossibility or other sufficient cause, may, in his discretion, extend the time for registration, or order the omission or misstatement to be rectified on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter or thing, as he thinks fit to direct.

"8. No defect or irregularity in the execution of an instrument containing a mortgage, charge or assignment, no defect, irregularity or omission in any affidavit, and no error of a clerical nature or in an immaterial or non-essential part shall invalidate or destroy the effect of the mortgage, charge or assignment or the registration thereof, unless in the opinion of the court or

judge before whom a question relating thereto is tried, such defect, irregularity, omission or error has actually misled some person whose interests are affected by the mortgage, charge or assignment."

Under these sections Mr. Walsh strenuously contends that if I find, as I do find, that all debentures in question were sold to the debenture holders on the distinct representation and belief, existing on both sides, that the debentures in fact did create a charge, and if I find, as I do, that an equitable charge was actually created, the Court ought now, under its powers given by the two sections above quoted, to amend the trust document and debentures by inserting charging provisions therein; and in regard to the error committed by the solicitor of the company in March, 1938, in filing with the Provincial Secretary the wrong document as exhibit "a" to the affidavit of Mr. Shipman, when the affidavit contemplated the debenture form being an exhibit thereto, that I should direct that this omission be rectified by the filing of a copy of the debenture originally contemplated, and thus put things right for his clients.

In support of this contention he relies principally upon the case of *Re Dainty Confections Limited*, 17 C.B.R. 295, reversed 18 C.B.R. 67, [1936] O.W.N. 625, [1937] 1 D.L.R. 249. However, a perusal of that case shows very important differences from the case at bar. That case in the first place is not a case under The Corporation Securities Registration Act at all but is a case under The Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, c. 164. That Act requires that to keep a chattel mortgage alive as against creditors and subsequent purchasers for value it must be renewed once a year within the last month of expiry. Now in the *Dainty Confections* case, through an error arising from the taking of the date of the drawing of the chattel mortgage rather than the date of filing, in determining when the year expired, the renewal was filed a few days too soon, and an application was made to the County Judge, after the error was discovered and after bankruptcy had intervened, to amend the error and permit the registration of the renewal. No new creditors had come in in the meantime, as the Court carefully pointed out, and therefore no injustice was done to the creditors to whom liabilities had been incurred while the chattel mortgage was still current.

In that case it was a mere and very natural slip which the Court corrected, especially because no new rights of creditors had come into being in the meantime. In this case I am asked in the first place to rectify an error in registration which is now nearly two years old, in respect of the debentures originally contemplated, during the existence of which error about \$27,000 worth of debentures were sold. In regard to that, present creditors have come into existence and extended their credit, since the time of faulty registration. I do not know if any creditors searched at the Provincial Secretary's office for charges (I imagine not) but if they had while that document remained on file there, up to April, 1939, they would not have seen that a charge was contemplated of course, but they would have seen that the Act had not been complied with and therefore they might assume that it was safe to go ahead and supply goods or extend credit. In addition, I am asked practically to re-make the new trust deed and the definitive debentures issued, as against creditors who extended credit in the meantime. At first I thought that I might be able to differentiate between those who bought their debentures before the trust deed was drawn up and those who bought afterwards, but I can see no reason for so doing, having regard to all the circumstances. All parties were equally taken in.

It seems to me that despite the peculiar wording of s. 7 of The Corporation Securities Registration Act that I cannot now either amend the original registration of March, 1938, to enable those who bought before February 8, 1939, to become secured creditors, or re-make the later documents as aforesaid.

S. 2 of the Act provides that certain formalities must be observed, or the charge is void against creditors. I am puzzled as to the meaning of the words in s. 7, "Subject to the rights of other persons accrued by reason of any omission or misstatement referred to in this section", but I take that to mean that if any amendment were made it would not affect the rights of creditors whose rights had come into being during the whole period, as they have in this case. If the company were a going concern and had a limited number of creditors and good prospects, I presume that I now could, and should, avoid the difficulties of imperfect registration and the mistake in drawing the

trust document and definitive debentures, but the rights of creditors having accrued and the indebtedness being as great as it is, it does not seem to me to be possible that I should make the required corrections.

Since the argument I have read the proceedings under The Companies' Creditors Arrangement Act before Godfrey J. The meeting of creditors was a largely attended one, the *quota* provided by that Act necessary to make any resolution of composition binding upon all having been comfortably complied with.

The creditors present, I have no doubt, understood from Shipman's remarks (above referred to) that the debenture holders had a prior claim. At the meeting those creditors present (their action, by virtue of the Act, being binding on all unsecured creditors), in the belief that they were in a secondary position, agreed to the following arrangement: They accepted notes for twenty per cent. of their respective claims, payable at six per cent. interest, in twelve months, for thirty per cent. of claims payable in twenty-four months; and the balance payable in thirty-six months.

I cannot think that such action would in any way estop the creditors, in the first place because all did not attend the meeting, and secondly because no statement of Shipman's interpretation of the debenture holders' rights would be binding on them. It may be that they were led into their action by that statement and that if they had realized the real state of affairs they would not have compromised so easily. I cannot see that now they are barred by these matters or prevented from insisting on their rights under The Corporation Securities Registration Act.

Re Beaver Truck Co. Ltd., [1926] 1 D.L.R. 71, a decision of the Master (afterwards Garrow J.) is a case which has some similarity to the case at bar in which the reasoning is helpful in determining to what extent (if any) non-compliance with a statutory enactment, where an equitable charge is apparent, may be overcome.

In that case the trust document securing bonds had been drafted and probably finally settled, but it had not been executed, or registered as required by s. 69A of The Dominion Companies Act, 1906, as enacted by 1917, c. 25, s. 9, which section is somewhat similar in effect to that of The Corporation Securities Registration Act.

Counsel in that case relied upon the equitable doctrine that where the parties have advanced moneys in good faith upon securities the issue of which was duly authorized, they are to be treated in all respects as if the securities had in fact been issued and delivered.

Garrow J., at p. 73, says: "But giving full effect to that principle and treating the matter as if in fact the mortgage had been executed and the bonds delivered to the purchaser, what follows? I do not think the principle can be strained further and made to overcome the express statutory enactment already referred to where, as here, a winding-up order has intervened . . ."

I think therefore that the effect of ss. 7(1) and 8 of The Corporation Securities Registration Act is not that a document can actually be made over but that small accidental imperfections in the document, including failure to file within the required time, may be rectified, and I agree with the remarks of Garrow J. above set forth.

That being so, I feel that, much as it goes against the grain in this matter, I must decide the question against the debenture holders. I feel this way because I believe the evidence of Wismer and the witness Ashwell and I believe that they acted in perfect good faith in regard to selling the debentures to these people. The result of this decision, I am aware, works a great injustice to the purchasers of debentures, but the effect of the legislation is to deprive them of their rights. In regard to the actions of Shipman in the later stages of the marketing of these debentures, where he went on and sold debentures to the extent of about \$25,500, I do not feel so charitably as I do in regard to Wismer and his associates. At that time Shipman knew that the company was in difficulties because it had made a proposition to the creditors. It seems to me that Shipman, while I am sure he honestly believed up to January, 1940, that what he was selling created a first floating charge on the assets of the company, should not, in the precarious condition of the company, have sold bonds to those who purchased after the Wismer-Harper agreement expired. Even though it was thought that they created security, it seems to me that whereas the sales before that were made with some expectation of the company getting on, any sales made thereafter could not have been justifiably made with any expectation that the company would be a suc-

cess, in view of the difficulties which were outlined by Mr. Wismer in his evidence and the composition with the creditors, all of which circumstances were well known to Shipman.

I declare that the holders of the debentures are, as against the unsecured creditors of the company, not secured creditors, but are ordinary creditors and are entitled only to share *pari passu* with the other creditors of the company.

I also declare that there can be no differentiation made, in view of the errors aforesaid, between those who bought prior to February 8, 1939, and those who bought subsequently.

Before leaving the subject, I want to say once more that while the Premier Trust Company acted in my opinion with perfect propriety and as well as it could under the circumstances, difficulties arise when trust companies put themselves in a dual position. As trustee for the debenture holders, which it was before it became trustee in bankruptcy, its duty was to do the best it could for the debenture holders. Its duty as trustee in bankruptcy was in direct conflict with this and in my opinion it should not have accepted the position of trustee in bankruptcy. If it had not accepted that office no such situation as ensued by reason of the letter of August 6th would have arisen.

While the debenture holders have failed in their application, it seems to me that it was in the interests of the public and in the interests of all parties concerned that this issue should have been tried, and as the debenture holders were in no position, in view of their losses and circumstances, to carry on the issue, and as I appointed Mr. Clark to represent the other debenture holders in the issue, it is a case where the estate, in my opinion, should bear the costs of the matter.

Therefore, the order will go making the above declarations. I direct that the costs of the trustee and of the debenture holders, of the motions and of the issue, be taxed by the Registrar in Bankruptcy and be paid out of the estate.

Judgment accordingly.

Solicitor for the trustee: Joseph A. Sweet, Hamilton.

Solicitor for the debenture holders: E. B. Stirling, Ridgetown.

[COURT OF APPEAL.]

Umphrey v. Davis.

The Mortgagors' and Purchasers' Relief Act, 1933 (Ont.), c. 35—Applicability—Ss. 3, 4(1) (a), 37—Agreement, after March 4th, 1932, Extending Time for Payment of Principal, and Reducing Rate of Interest.

Where a mortgage was made in 1923, and an agreement was entered into in May, 1935, extending the time for payment of the principal, and providing for a reduction in the rate of interest, *held*, the assignee was entitled to sue upon the mortgage, as extended, without the leave of a judge under The Mortgagors' and Purchasers' Relief Act, 1933 (Ont.), c. 35. The extension was not one contemplated by s. 37 of the Act, and the action was not on the extension only, and accordingly s. 4(1)(a) of the Act was inapplicable, by the effect of s. 3.

AN appeal, by special leave, from an order of Rose C.J.H.C., dismissing a motion for judgment upon the admissions contained in the pleadings and examination.

The action was upon a mortgage made in 1923. The plaintiff, as assignee of this mortgage, entered into an agreement with the defendant, the mortgagor, on May 13th, 1935, providing for a reduction in the rate of interest, and for an extension for a further period of four years of the time for payment of the principal. Upon the expiration of the time prescribed by this agreement, the plaintiff brought action for foreclosure and for judgment on the covenant. The leave of the Court was not obtained before bringing the action, and the defendant pleaded The Mortgagors' and Purchasers' Relief Act, 1933 (Ont.), c. 35, as a bar to the action. The plaintiff moved for judgment, under Rule 222, upon the admissions of fact in the pleadings and in the examination for discovery.

May 9th, 1940. The motion was heard by ROSE C.J.H.C. in Chambers at Toronto.

T. K. Creighton, K.C., for the plaintiff, applicant.

A. W. S. Greer, for the defendant, respondent.

May 9th, 1940. ROSE C.J.H.C. (orally at the conclusion of the argument):—This is the ordinary mortgage action in which the plaintiff claims judgment upon the covenant and for foreclosure. The motion is a motion under Rule 222 for judgment upon admissions of fact in the pleadings and in the examination of the defendant for discovery. The pleadings and the examination taken together do seem to admit the material facts; and if, upon those facts, the plaintiff is entitled to judgment, I can see no great merit in the suggestion that the case ought to be

allowed to proceed to trial. If, on the other hand, the case is one in which, as it is contended, the leave of the Court must, under The Mortgagors' and Purchasers' Relief Act, 1933 (Ont.), c. 35, be obtained before the action is proceeded with, it seems to be desirable that that fact should be ascertained as early as possible so that, if the action has to go to trial, the trial may not be a futile one resulting only in the declaration that the action without the leave is not maintainable. In other words, it seems to be desirable forthwith to pass upon the question as to the applicability of the provisions of The Mortgagors' and Purchasers' Relief Act, 1933.

The question raised is not, as I see it, a very simple one. The mortgage was made in 1923. After a certain extension or renewal, which does not enter into the present discussion, an arrangement was made in May, 1935, for a reduction of interest and for an extension for four years from March, 1936, of the time for payment of the principal. As soon as that extended time had elapsed, this action was begun. The extension resulted from an application or a proposal made by the mortgagor under The Farmers' Creditors Arrangement Act, 1934 (Dom.), c. 53. The Official Receiver got the parties before him on May 13, 1935, and they having agreed to a reduction of interest and to the extension, and to a term that the mortgagor during the extension should execute certain repairs, a rather informal document expressive of the agreement was drawn up and was signed by both parties. The question is whether that extension takes the case out of The Mortgagors' and Purchasers' Relief Act and leaves the mortgagee free to proceed without leave to the enforcement of the mortgage although the mortgage was made before the day named in the Act, the 4th of March, 1932.

Reading ss. 3, 4 and 37 together, one must be led to think that it may have been the intention of the Legislature to say that if a mortgage made before the 4th of March, 1932, was after the 4th of March, 1932, renewed or extended for more than three years, the mortgagee might, notwithstanding the provisions of s. 4(1)(a), enforce the mortgage without first obtaining leave to proceed. But, while it may have been the intention of the Legislature so to enact, my opinion is that the statute does not give expression to that particular intention. S. 4(1)(a) is in its terms absolute. By it, it is enacted that no person shall without leave take or continue any action or pro-

ceeding by way of foreclosure or sale or otherwise for the recovery of principal money secured by a mortgage of land made prior to the 4th day of March, 1932. But that absolute provision is, it is suggested, qualified by s. 3 of the Act. S. 3 declares that the first Part of the Act, which includes s. 4, shall only apply to a mortgage or any renewal or extension thereof where such mortgage has been made or entered into prior to the 4th day of March, 1932. Down to that point the words are plain enough, and, so far as s. 4(1)(a) is concerned, are quite unnecessary, because s. 4(1)(a) in terms applies only to a mortgage made or executed prior to the 4th day of March, 1932. But s. 3 goes on with some words which are not easy to understand. They are: "or any renewal or extension thereof within the provisions of section 37." That is to say, the section declares that the provisions of Part I of the Act shall apply only to a mortgage or an extension thereof where the mortgage has been made before the 4th March, 1932, "or any renewal or extension thereof within the provisions of section 37"; and what the last quoted words mean, I find it very difficult to gather.

Turning to s. 37, one finds it enacted that the provisions of the Act shall extend and apply to any renewal or extension of any mortgage made prior to the 4th day of March, 1932, provided that such renewal or extension is made prior to that date; "and"—and this is the part of the section that has been under discussion here—"and shall extend and apply to any renewal or extension of any such mortgage" (that is, of any mortgage made before March 4th, 1932) "if such renewal or extension is made after the 4th day of March, 1932, and is for a period of less than three years" (which is not the present case) "or for three years and over and the rate of interest has been increased" (which, again, is not the present case). So that we have s. 37 declaring that the provisions of the Act shall extend to certain extensions of old mortgages, the extensions specified being extensions other than the kind of extension that we have in the present case. The matter therefore stands thus: If the action is an action upon or to enforce the extension of 1935, there is nothing in the Act to require the plaintiff to obtain the leave of the Court before proceeding. But if the action is an action upon the mortgage, then the provisions of the Act do apply, and the leave is necessary unless the words of s. 3,

taken with s. 37, mean that the provisions of the Act shall not apply to a mortgage extended after March 4, 1932, unless the extension is one of those mentioned in s. 37. As I have said, it may possibly have been the intention of the Legislature to enact what I have just stated, but I cannot find, and this is repetition, words expressive of that intention. The words are not that the provisions of Part I, and, in particular, the provisions of s. 4(1)(a), shall not apply to an old mortgage which, after March 4th, 1932, has been extended, and so on; but the words are that the provisions of the Act shall only apply to any renewal or extension of the mortgage within the provisions of s. 37; that is, as I read it, that the provisions of the Act shall apply only to such a renewal as is mentioned in s. 37.

Well, the provision of the Act that the defendant seeks to make applicable is s. 4. S. 3 seems to say that s. 4 as applied to extensions shall have effect only when the extensions are of the kind set out in s. 37. But, again to repeat, the enactment that the provisions of the Act shall not apply to the kind of extension that we have here, that is, an extension for four years, does not seem to get us very far unless the plaintiff's action is an action upon the extension; and, as I do not think that the plaintiff's action is an action upon the extension, I find myself driven to the conclusion that there is nothing in s. 3 or s. 37 to make inapplicable the clear provision of s. 4(1)(a) that the action upon the mortgage shall not proceed without the leave of a judge. And so my opinion is that this present action, without that leave, is not maintainable, and that the motion for judgment must be dismissed.

It is true that upon the meaning that I am giving to ss. 3 and 37, there may be few cases in which s. 37 can be applied. But there are some cases in which the mortgagee must sue upon the extension, or, at least, must use the extension in support of his action. For instance, if there has been an extension for more than three years by which the rate of interest has been increased, then by s. 37 the provisions of the Act shall extend to that particular extension; also, if an agreement for an extension for less than three years contains a covenant to pay, and the mortgagee desires to enforce that covenant, he will have to apply for leave to sue. But I do not know that it is necessary to consider what effect ss. 3 and 37, taken

together, may have. The question that I have to determine is whether the effect of those two sections is in this particular case to deprive the mortgagor in this action upon the mortgage of the protection afforded by the terms of s. 4(1)(a); and I have given my reasons for thinking that ss. 3 and 37 taken together do not deprive the mortgagor of that protection.

I do not suppose that I have power upon this motion to stay the action. There is no motion before me for a stay; and it would not be right for me to exercise my power to turn the motion into a motion for judgment, because the plaintiff may be able to obtain the leave which I think he must have before he can proceed. But I suppose that no order staying proceedings is in the least requisite. The plaintiff, no doubt, will either apply for the leave or appeal from my order—I suppose the order is interlocutory; but I imagine there would be no difficulty in obtaining leave to appeal; there must be good reason to doubt the correctness of almost any interpretation placed upon the two sections—and I should not imagine that, my opinion having been expressed, and a note of it made, the plaintiff would be likely to proceed to trial without having adopted one or the other of the courses that I have mentioned.

The costs of the motion ought to be to the defendant in any event in the cause.

The plaintiff applied for leave to appeal from this order, and the motion was heard by KELLY J. in Chambers at Toronto.

T. K. Creighton, K.C., for the plaintiff, applicant.

G. D. Watson, for the defendant, respondent.

May 28th, 1940. KELLY J. (orally, at the conclusion of the argument):—This was a motion for judgment on admissions contained in the examination for discovery and in the pleadings. The motion was refused by the Chief Justice of the High Court, and an application is now made to me for leave to appeal from the decision of the Chief Justice.

I think leave should be granted, and I reach that conclusion more easily because the Chief Justice himself suggested, and indeed seemed to think, that it was a case on which the Court of Appeal should rule.

The motion is brought on the ground that there is reason to doubt the correctness of the decision of the Chief Justice,

and that the matter involved is one of such importance that leave should be given.

Dealing with the matter of importance, it seems to me that the Chief Justice was of the same opinion as I am, that the matter is one of great importance, affecting certainly a great many mortgages. If the interpretation which the Chief Justice has given to the Act is the true one, it seems to me that it would only be in a very rare case that any mortgage made before 1932 could, under any circumstances, be sued on without leave of the Court, where the default is one in payment of principal. If that is wrong, the importance is obvious from the very fact of the great number of mortgage contracts affected by the decision.

The relevant sections of The Mortgagors' and Purchasers' Relief Act, 1933, are s. 3(a), s. 4(1)(a) and s. 37. The mortgage sued on here was made in 1923. S. 4(1)(a) of the Act prohibits any action to foreclose such a mortgage without leave of a judge, but s. 4 is governed by s. 3, which says in effect that the provisions of Part I shall apply only to a mortgage or renewal or extension thereof entered into prior to the 4th March, 1932, or a renewal or extension described in s. 37. It seems to me—and in this I think the Chief Justice is of the same opinion—that if we start out with a mortgage that itself cannot be sued on without leave, and an extension or renewal of that mortgage is entered into by the parties to it, the prohibition against action on the original mortgage ceases to be effective, and regard is thereafter paid to the nature of the extension, that is, the mortgage once being extended, it is the extension which is examined, and if that extension is one of the sort described in s. 37, the Act still applies. If that extension is not one of the sort described in s. 37, the Act has no application because the extension has made a new bargain which the Legislature has not sought to interfere with. I think the Chief Justice agrees with that, although he says in his reasons that the language used by the Legislature does not clearly express that intention; but as I read the reasons of the Chief Justice, he decided the motion on the narrow ground that the action was on a mortgage dated in 1923 and not upon an extension. The Chief Justice is a judge of immensely greater experience than I, but it seems to me there is a strong probability, or at least possibility, that

he is wrong, for this reason, that to speak of an extension of a mortgage as if an action might be brought thereon without reference to the mortgage itself is a contradiction in terms. An extension is not something new; it is the original mortgage extended, or so it seems to me. Here, after 1932, an agreement was entered into, reducing the rate of interest and extending the time for payment for four years. There is no expressed promise to pay at the end of four years, and no expressed promise to pay the interest at 4 per cent., but the memorandum of the extension agreement is: "The undersigned agree to the following, (1) interest on the first mortgage to be 4%, (2) mortgage is then extended four years," and the parties have agreed to that interest and those terms.

With great respect to the Chief Justice of the High Court, it seems to me that when a person sues on that mortgage four years later, asking for the reduced rate of interest and not for the interest called for by the original mortgage, he is in fact suing upon an extension of the original mortgage. The rights of the parties are the rights as fixed by the original mortgage, varied by the extension agreement. This is not an extension, as the Chief Justice pointed out, covered by s. 37 and not one, therefore, where the Act applies, and it seems to me that this is a matter on which the Court of Appeal may well be asked for its decision.

It is necessary only for me to be of the opinion that there is ground for thinking the decision of the Chief Justice may be wrong. I think both the Chief Justice and I agree that the matter is one of importance. Leave will be granted and costs will be in the cause.

June 11th, 1940. The appeal was heard by MIDDLETON, MASTEN and GILLANDERS JJ.A.

T. K. Creighton, K.C., for the plaintiff, appellant: No leave was necessary, upon a true construction of ss. 3, 4, and 37 of the Act. The agreement between the parties constituted a renewal or extension of the mortgage within the meaning of the Act, and being for more than three years, and providing for a reduction in the rate of interest, was not within the provisions of s. 37. It was an amendment of the original mortgage, and was such a variation as to create a new contract, upon which the action was based: *Morris v. Baron & Company*, [1918] A.C.

1, at 31; *Reed v. Deere* (1827), 7 B. & C. 261; *Bacon v. Simpson* (1837), 3 M. & W. 78.

J. R. Cartwright, K.C., and *A. W. S. Greer*, for the defendant, respondent: The judgment appealed from is correct. The Act should be deemed to be remedial legislation, and, as such, should be liberally interpreted: *Appelbe v. Windsor Security Co. of Canada Limited* (1917), 41 O.L.R. 217, 40 D.L.R. 256; *Re Shepard and Rosevear and Moyes Chemical Co. Limited* (1918), 42 O.L.R. 184. The intention of the Legislature must be ascertained from what was enacted in express words, or by reasonable and necessary implication: *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22.

June 18th, 1940. MIDDLETON J.A.:—This action was brought for the purpose of enforcing a claim upon a mortgage and upon an extension agreement. The mortgage was dated March 10th, 1923, and was for the sum of \$6,500 and interest at 6 per cent. per annum. It was from time to time renewed, and the balance due in May, 1935, was the sum of \$6,000. Mr. Davis consulted the Official Receiver appointed under the Farmers' Creditors Arrangement Act, who interviewed the mortgagee. The result was an agreement of May 13th, 1935, which provided that the interest should be reduced to 4 per cent., and the mortgage should be extended for four years from March 10th, 1936, at 4 per cent. interest rate. Mr. Davis also agreed to shingle the roof of his barn.

This agreement is extremely informal and, manifestly, it must be read as referring to the mortgage in question, and the mortgage must be taken to remain in force save as modified by the agreement. This was a new contract made on the date which the memorandum bears. All that is not provided for in the agreement is to be found in the mortgage as it originally existed. If an extended agreement had been drawn up it would so appear. The mortgage was not paid when it fell due under this agreement, and on March 14th, 1940, this action was commenced.

The learned Chief Justice of the High Court, being applied to, made an order dismissing the action because no leave had been obtained to bring the action, under the provisions of The Mortgagors' and Purchasers' Relief Act, 1933 (Ont.), c. 35. Leave to appeal from this judgment was granted by Kelly J.

We think the view expressed by Kelly J. is entitled to prevail.

The case of *Long v. Ancient Order of United Workmen* (1898), 25 O.A.R. 147, particularly the judgment of Osler J.A. at p. 156, is helpful.

It is not possible to eliminate all difficulty in construing the statute in question, but it is not possible to say that the action is upon the mortgage; it is upon the extension agreement, and the promises that are implied in it. The appeal must be allowed, and as this is the only defence relied upon, judgment in the action should follow.

MASTEN J.A.:—I have had the privilege of reading the judgment prepared by my brother Middleton, and I agree with his conclusion and with the reasons stated by him. I desire only to add to what has been said, an observation in regard to one aspect of the case.

When the mortgage dated March 10th, 1923, fell due and was not paid according to its tenor, there accrued to the mortgagee a right of action by virtue of which the mortgagee was entitled to payment forthwith of the principal and interest at 6 per cent. That was the situation on May 12th, 1935.

By the agreement of May 13th, 1935, the situation that existed the day before was changed. The plaintiff appellant gave up her present right of action and her right to claim interest at 6 per cent. and in lieu thereof accepted an agreement for payment in the year 1940 and interest at 4 per cent. Her right of action was gone and in lieu of that she held a new and different agreement, which, as pointed out by my brother Middleton, embraced the terms of the original mortgage save as modified.

GILLANDERS J.A. agreed with MIDDLETON J.A.

Appeal allowed and judgment entered for the plaintiff with costs.

Solicitors for the plaintiff, appellant: Grierson, Creighton & Fraser, Oshawa.

Solicitors for the defendant, respondent: A. W. S. Greer, Oshawa.

[COURT OF APPEAL.]

McSweeney et al. v. Windsor Gas Company Limited.

Negligence—Construction of Jury's Answers—Refusal of Court of Appeal to Interfere if Evidence Exists to Support Findings—Installation of Burner for Natural Gas—Duty to See that Chimney and Fume Pipe Clear.

The plaintiffs sued for damages resulting from the escape of fumes from a gas furnace in the house occupied by them. Coal had formerly been burned in the furnace, and the gas burner was installed by the defendant's employees under a contract with the plaintiff G. W. M., the tenant of the house. At the time of making the installation, no inspection was made of the chimney, nor was G. W. M. warned that it would be advisable for him to have such an inspection made. The furnace operated throughout one winter, and for part of a second winter. In the middle of the second winter the chimney and flue pipe became clogged through the falling of an accumulation of soot which, according to the evidence, could only have formed in the chimney while coal was being burned. The jury, in answer to questions, found that the defendant's employees had been negligent at the time of installing the burner, in not cleaning the chimney and fume pipes, or not advising the plaintiff tenant to have them cleaned, and that this negligence had caused or contributed to the injuries suffered by the plaintiffs. They also found further negligence on the part of the defendant's employees on later visits of inspection, particularly on a visit immediately before the accident. They further found that there had been no contributory negligence on the part of the plaintiffs. Judgment was entered, on these findings, for the plaintiffs.

On appeal, *held*, the judgment should stand. There was evidence to support the jury's finding of negligence in the installation of the gas burner; the finding should be interpreted as one that it was the duty of the defendant to see that the outlet for the fumes was clean, and that it was not enough, particularly in view of the knowledge that coal had previously been burned in the furnace, merely to see that the chimney had a good draught at the time of installation. The other parts of this answer, dealing with later conduct on the part of the defendant's employees, were not within the scope of the question, which had referred only to negligence in the installation of the burner, and they might be disregarded. It could not be said that it was perverse for the jury to find that there was no contributory negligence on the part of the plaintiffs: *Dominion Natural Gas Company, Limited v. Collins*, [1909] A.C. 640, referred to.

G. W. M.'s application for gas, signed at the same time as the contract for the burner, contained an acknowledgment of receipt of a copy of the defendant company's rules and regulations, according to which the gas was to be supplied. These rules, which contained a provision exempting the company from liability in certain circumstances, were printed on the lower half of the card containing the application, below a perforated line, and the trial judge found as a fact that the applicant was unaware of the contents of this half of the card, and that no proper attempt was made to direct his attention to the regulations. *Held*, by the trial judge, this provision in the regulations could not be invoked to defeat the plaintiffs' claim.

AN appeal from the judgment of Greene J. entered on the findings of a jury, in an action for personal injuries caused by the escape of gas fumes from the furnace in the plaintiffs' house. The facts are fully set out in the judgments now reported. An earlier appeal in the same action is noted in [1940] O.W.N. 459.

May 12th to 19th, 1941. The action was tried by GREENE J. and a jury, at Windsor.

J. H. Clark, K.C., for the plaintiffs.

J. A. McNevin, K.C., for the defendant.

October 8th, 1941. GREENE J.—The plaintiffs G. W. McSweeney and Edith McSweeney are husband and wife, and the infant plaintiff Stewart McSweeney is their son.

On the 15th day of December, 1939, the plaintiffs Edith McSweeney and Stewart McSweeney suffered injuries by poisoning from gas fumes which escaped from the gas furnace in the residence occupied by all the plaintiffs. The plaintiffs charge that the gas fumes which did the damage escaped by reason of the negligent installation of the gas burner by the defendant company, in September, 1938, or some fifteen months prior to the escape of fumes complained of.

In the summer or early autumn of 1938, G. W. McSweeney became a tenant of the house in which the accident happened. Prior to his occupation the furnace in the house had been used for the burning of coal, but McSweeney decided to use natural gas for heating purposes. On the 14th of September, 1938, the plaintiff G. W. McSweeney entered into two arrangements with the defendant company. One contract provided that the defendant company would install an automatically controlled gas burner in the premises of the plaintiff G. W. McSweeney at the cost of the defendant company. McSweeney agreed to pay rent for the burner at the rate of \$15.00 yearly. At the same time he entered into a written contract that the defendant company should supply to him all natural gas for fuel purposes in the premises in question.

The jury found negligence against the defendant company in the following words:

“The jury find the defendant’s employees negligent at the time of the installation of gas unit in September, 1938, for not cleaning the chimney and fume pipes or for not advising the plaintiffs to have them cleaned knowing that coal had been used previously, thereby contributing to the injuries suffered by the plaintiffs in December, 1939.”

The jury also found that there was no contributory negligence on the part of the plaintiffs.

It was argued very strongly, on behalf of the defendant company, that the action could only be laid in contract and that G. W. McSweeny was the only person to whom the company owed a duty as he was the only person with whom the company made a contract.

The plaintiffs' claim is not based on contract but is based entirely on negligence in connection with the installation. The defendant company undertook the duty of installing a gas burner, and further contracted to supply and did supply the gas to be consumed in such burner. In my opinion Mrs. McSweeny and her son, ordinary residents of the house, must have a right of action against the defendant company if it was negligent in any way in connection with the installation of a burner to be used in the consumption of a dangerous substance such as fuel gas. The jury has found that the company was negligent in connection with the installation of the burner, and that is the fact I have to deal with.

The plaintiffs pleaded various types of negligence against the defendant company, but at the conclusion of the evidence they agreed, through their counsel, that the only question to be submitted to the jury on the question of negligence on the part of the defendant company should be as follows: "Was there any negligence on the part of the defendant's employees in the installation of the burner in September of 1938 which caused or contributed to the injuries suffered by the plaintiffs in December of 1939?" That question the jury answered in the affirmative and gave the particulars of that negligence as set out above.

The jury found further negligence against the company on December 14th, 1939, the day before the accident, but I do not propose to discuss such finding as it was not pertinent to the question agreed to by counsel for the plaintiffs.

At the conclusion of the trial counsel for the defendant moved for dismissal of the action on the ground that the plaintiff G. W. McSweeny in ordering the supply of gas from the defendant company had contracted himself out of the right to claim damages for any misadventure arising from the gas.

The contract form used by the company was printed on a card, perforated horizontally in the centre. The upper half of the card was signed by McSweeny as applicant for the supply of gas under the following printed clause:

"THE UNDERSIGNED hereby applies for natural gas for fuel purposes only in the premises described above, to be supplied and paid for in accordance with the Rules and Regulations of the Windsor Gas Company, Limited, and agrees to pay on or before the date as shown on bill rendered, charges for all gas supplied hereunder and according to schedule of rates now in effect or hereafter established and until 48 hours after WRITTEN notice to discontinue the supply of gas to the said premises has been given by me or the guarantor hereunder.

"A COPY OF THE COMPANY'S RULES AND REGULATIONS IS HEREWITH ACKNOWLEDGED."

There was nothing else of any importance on this portion of the card. Below the perforated line was printed a heading in heavy type "EXTRACTS FROM RULES AND REGULATIONS" and then followed in very small type seven numbered clauses. The company claims exemption from liability under the second of these clauses, which is as follows:

"2. The Company shall use care and diligence to furnish a sufficient supply of gas, but the Company shall not be held liable for damages or loss resulting from any failure of supply occasioned by any one or more of the following causes: failure of wells; bursting of pipes; legal proceedings; action of elements or any cause beyond the control of the company. Neither is the Company to be held liable for damages to person or property resulting from explosion or fire or from contact with gas or otherwise arising from the use or pressure or escape of gas, whether accidental or otherwise."

McSweeney stated that the bottom portion of the card was never called to his attention, and that he was not aware of the contents, and that as a matter of fact he was not aware of its existence until this, the second trial of the action.

The following portion of the evidence of the office manager of the defendant company indicates clearly that no effort was made to direct the attention of the prospective customer to the attempt of the company to escape from liability by the clause in the regulations:

"Q. What is your practice when you sign up one of these cards, when somebody wants gas? Do you read over the whole thing to them? A. No.

"Q. You simply say: 'Sign here?' A. 'Sign it', and whether they read it or not . . .

"Q. You don't know, and furthermore you don't care? A. It is up to them. They should be interested enough, shouldn't they?

"Q. That may be a question of law. We won't fight about it here. His Lordship will deal with the law. But that is the practice; you tear it, you don't read it to them and if they want to look at it it is up to them; that is the practice? A. Yes.

"Q. How many of them throw their half down? A. I would say a great many of them.

"Q. Yes; most of them? A. I might say on that subject, we handle four or five hundred of them a month for the people who move continuously and they come in and sign one of these and it doesn't mean a thing to them."

The limitation of the company's liability was not actually included in that portion of the contract signed by McSweeny, and it seems to me that the Rules and Regulations, as described above, could only become binding upon a customer if reasonably called to his attention.

I find as a fact that McSweeny was not aware of the contents of the bottom half of the card headed "Extracts from Rules and Regulations" and I further find as a fact that no proper attempt was made to direct his attention to said regulations.

Under the circumstances, in my opinion, the plaintiffs are entitled to judgment in accordance with the findings by the jury.

February 3rd and 4th, 1942. The defendant's appeal was heard by ROBERTSON C.J.O. and FISHER and GILLANDERS JJ.A.

W. N. Tilley, K.C. (J. A. McNevin, K.C., with him), for the defendant, appellant: The jury's answer to question 2 [set out in the judgment of Robertson C.J.O., *infra*] shows a misconception of the duties of the appellant company. There was no duty, when installing a gas burner, to clean the chimney or to advise that it be cleaned. There was a proper draught when the burner was installed, and the jury should have considered whether the contract covered the cleaning of the chimney or the ascertaining if it was cleaned.

There were two separate contracts, one relating to the installation of the burner, and the other to the supplying of gas. Had our workmen tampered with the chimney, we would thereby

have assumed a risk beyond our contract. The most which could be expected of our workmen would be advice regarding the cleaning of the chimney, and there was no need of advice, since there was a sufficient draught. It is for the person to whom gas is supplied to see that the chimney is in a satisfactory condition.

This was not a case of faulty installation, as in *Dominion Natural Gas Company, Limited v. Collins*, [1909] A.C. 640.

The work done or left undone by our employees when installing the burner did not cause the accident. It resulted from the attempt of the plaintiffs to light the furnace without calling in our employees.

The contract for the supply of gas expressly provides that the company is not liable for damage resulting from explosion or fire or from contact with gas or otherwise arising from the use or pressure or escape of gas, accidental or otherwise. Under this clause there can be no liability on us by reason of supplying gas: *Watkins v. Rymill* (1883), 10 Q.B.D. 178; *Thompson v. London, Midland and Scottish Railway Company*, [1930] 1 K.B. 41; *Penton v. Southern Railway*, [1931] 2 K.B. 103, 100 L.J.K.B. 228; *Hood v. Anchor Line (Henderson Bros.) Limited*, [1918] A.C. 837, at 845.

I. Levinter, K.C. (*J. H. Clark, K.C.*, with him), for the plaintiffs, respondents. There is ample evidence to support the finding that the company's employees were negligent when installing the burner. To install a burner, the furnace must be connected to a proper outlet, and there was an obligation on the company to install it properly. A special duty rested on the workmen, since they were dealing with a dangerous commodity, natural gas. When a gas burner is installed in a furnace formerly used for coal, the gas fumes disintegrate the soot on the inside of the chimney, and if the chimney is not cleaned, this disintegration may result in its becoming blocked.

The company owed a duty in law to the plaintiffs to take proper precautions when installing gas-burning equipment: *Dominion Natural Gas Company, Limited v. Collins*, [1909] A.C. 640; *Parry v. Smith* (1879), 4 C.P.D. 325; *McSweeney et al. v. Windsor Gas Co. Ltd.*, [1940] O.W.N. 459. Gas is a dangerous thing within the rules applicable to things inherently dangerous:

Northwestern Utilities, Limited v. London Guarantee and Accident Company, Limited, [1936] A.C. 108, at 118.

The company, by its servants, was negligent in the inspection made the day before the accident: *Parry v. Smith*, *supra*.

The rules and regulations invoked by the company do not bar the plaintiffs' claim. They do not expressly exclude the liability of the company for negligence, and they should be construed strictly against the company, whose language they are: *Price & Co. v. Union Lighterage Company*, [1903] 1 K.B. 750, affirmed [1904] 1 K.B. 412; *Grill v. General Iron Screw Colliery Company Limited* (1868), L.R. 3 C.P. 476, at 481; *Beaumont-Thomas v. Blue Star Line, Ltd.*, [1939] 1 All E.R. 174, at 178, reversed [1939] 3 All E.R. 127; *Canadian Packing Co. v. Union Stockyards of Toronto Limited* (1922), 23 O.W.N. 291, at 293; *Nelson Line (Liverpool), Limited v. James Nelson & Sons, Limited*, [1908] A.C. 16.

There is no evidence that these rules and regulations were brought to McSweeney's attention, and the trial judge has found as facts that he was not aware of them, and that no proper attempt was made to direct his attention to them: *Heller v. Niagara Racing Association* (1924), 56 O.L.R. 355, [1925] 2 D.L.R. 286; *Grand Trunk Pacific Coast Steamship Company v. Simpson*, 63 S.C.R. 361, [1922] 2 W.W.R. 320, 65 D.L.R. 614; *Spooner v. Starkman*, [1937] O.R. 542, [1937] 2 D.L.R. 582.

W. N. Tilley, K.C., in reply. The company's workmen cleaned out the furnace, but were under no obligation to check the rest of the heating system. The cases cited for the respondents are distinguishable. *Dominion Natural Gas Company, Limited v. Collins*, *supra*, was considered in *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562, at 569, and applying the view expressed in the latter case, we must look to the circumstances of the installation to ascertain whether there was negligence. The burner might have been put in without a vent, if the owner was to be responsible for it. Since there was a chimney, our duty was merely to see that there was a draught.

Cur. adv. vult.

March 12th, 1942. ROBERTSON C.J.O.—An appeal by the defendants from the judgment of Greene J. of the 8th October, 1941, after the trial of the action before him with a jury, at Windsor.

This was the second trial of this action, a new trial of the action having been directed by this Court on October 29th, 1940. The reasons for judgment of this Court on ordering a new trial are to be found in [1940] O.W.N. 459. After the order directing a new trial the pleadings were amended by leave of the Master, and are now in quite different form from the pleadings on which the first trial was had. If one is to judge from the character of the questions submitted to the jury, it would appear that whatever may be the state of the pleadings, the issues submitted to the jury at the second trial were definitely narrower than before, more particularly with respect to the matters upon which the plaintiffs relied as constituting negligence on the part of the defendants.

The evidence given on the second trial was in some respects not the same as on the first trial, so that upon this appeal one may substantially disregard what happened on the former trial and appeal and proceed to deal with the case presented on the second trial as if there had been no former trial of the case. It is necessary to make a brief recital of the facts in order to properly discuss the questions presented on this appeal.

In September, 1938, the respondent, G. W. McSweeney, who had lately moved from London, Ont., to Windsor, and had become the tenant of a house there, applied to the appellants to install a gas-burner in the furnace in the house he had rented, and to supply natural gas for fuel. To the knowledge of McSweeney, the prior occupant of the house had burned coal in the furnace. This was obvious from the fact that the grates were still in the furnace and some remains of a coal fire. For how long coal had been burned there is not stated, but it does appear that at some still earlier time gas had been burned in the furnace, for a pipe connected with the appellants' gas supply system still extended into the furnace.

McSweeney signed an application in writing covering the installation of the gas-burner, and a separate application for the supply of gas for fuel, and both are dated September 14th, 1938. Within a few days after the application the appellants' man having charge of this sort of work, came to install the gas-burner. He removed the grates and cleaned all coal and ashes from the firepot of the furnace, inspected the furnace itself for any cracks or crevices or other fault, and then proceeded to

install the burner. The burner was placed in the ash-pit of the furnace, and was then connected with the gas-line, already extended into the furnace. After adjusting and testing the burner to see that it operated properly, and observing that there was a good draught through the flue-pipe connecting the furnace with the chimney, subject to the electrician connecting up his wires, he left the burner to be put in operation when heat was desired. The appellants' workman did not take down the flue-pipe or examine the chimney to ascertain their condition further than to see that at the time there was a good draught. On September 30th, 1938, at McSweeny's request, the appellants' man came and lit the furnace and checked the draughts and controls. The burner was in operation throughout the winter of 1938-39 and from some time in the autumn of 1939 until December 14th, 1939. In 1939, as in 1938, the furnace was lit by a man sent for the purpose by the appellants at McSweeny's request. There is no complaint that the burner itself, as a piece of equipment, did not operate satisfactorily. The respondents say, however, that commonly, both in the first winter and in the second, there was an odour of gas in the basement, more noticeable at some times than at others, and that at times heat did not come on with the adjustment of the thermostat. They say that frequently either one of them telephoned the appellants about this trouble and some one was sent up to attend to it. The appellants say, on the other hand, that they keep records of such occasions and their records show very few calls indeed from the respondents, and none for the purposes the respondents allege. The men whom the appellants employed to answer such calls also have no memory of the frequent visits alleged. In any event if there were complaints, as the respondents say, it is clear that nothing was done to the flue-pipe or to the chimney in consequence of them. The respondents say that the odour of gas in the basement persisted in spite of their complaints, but that the supply of heat was improved, for the time, by the men who came.

On the morning of the 14th December, 1939, no heat could be got from the furnace, and on going down to the basement Mr. McSweeny smelled an odour of gas there, and the appellants were called. Two of the appellants' men came at about one o'clock, while McSweeny was at home for lunch, and he went with them down to the furnace. There is some conflict of testi-

mony as to what was said by the appellants' men on this occasion, but there is agreement on some matters. It is not disputed that one of the appellants' men lit a match and held it at the fire-door of the furnace and the match was blown out. The appellants' men say that meant a down-draught through the chimney. As the result of some further examination both indoors and outdoors, the appellants' men noticed some cracks near the top of the chimney that they thought were causing a down-draught in the chimney, and they advised Mr. McSweeney to have them repaired. They then went away, leaving the gas shut off. Mr. McSweeney got in touch with his landlord, who, next morning, sent a man named McDonnell to repair the cracks in the chimney. It was a cold day to apply mortar to the top of a chimney and McDonnell was not a brick-layer, but, after getting enough mortar in the cracks to stop them up for the time being, he reported to Mrs. McSweeney that he had fixed the chimney. He then went down to the furnace with her, and she turned on the switch that started the furnace. Mrs. McSweeney had never before started the furnace, and neither she nor McDonnell made any examination or test to see whether there was a proper draught. This was a little after 10 o'clock in the morning. At about 11.30 a.m. Mr. McSweeney had a telephone call from Mrs. McSweeney which she did not finish, and he hastened home. He found his wife lying unconscious on the floor at the telephone with the receiver hanging beside her. She had been overcome by fumes from the furnace. His eldest boy, who had remained in bed with a cold that morning, was also affected by the fumes, but not so seriously as his mother, as the vents in the storm-windows of his room were partly open and some air had been coming in. McDonnell, who happened to be passing by at the time, answered Mr. McSweeney's call for help. After they had given some attention to Mrs. McSweeney and the boy, McDonnell went down to the furnace to investigate, and finding there was no draught at the chimney, he pulled the flue-pipe out and found it filled with soot for a distance of some 15 inches back from the chimney. The chimney itself also contained a great deal of soot mixed with a more gritty substance, presumably particles of mortar fallen from higher up in the chimney. He emptied the flue-pipe and cleaned out the chimney and then found ample draught.

It is established by evidence that the burning of coal, and more especially coal of the kind that had been burned in this furnace, (as indicated by what was found when it was cleaned out to install the gas-burner) causes soot to accumulate in the chimney, and perhaps in the flue-pipe as well. The burning of gas does not cause an accumulation of soot. The soot that McDonnell took out on 15th December, 1939, had undoubtedly been somewhere in the chimney or flue at the time the gas-burner was installed in September, 1938. The burning of gas has a tendency to dry out the inside of the chimney to such a degree that particles of the mortar on the inside of a brick chimney will fall and soot clinging to the inside of the chimney may also come down. There is no definite evidence as to how long it would take, with normal use, to accumulate in the chimney sufficient soot to block it up if the soot fell, nor is there any evidence as to when this chimney had last been cleaned before McSweeney's occupation. There can be no question, however, that in spite of the fact that the appellants' workman found a good draught when he installed the gas-burner, there was at that very time somewhere in the chimney and flue-pipe enough soot, with any particles of mortar that fell, to completely block both the pipe and the chimney, when it had accumulated at the bottom, as McDonnell found it on 15th December, 1939.

Evidence was given by witnesses qualified, at least technically, to give it, to the effect that good practice in installing a gas-burner in a furnace, as here, requires that it be made certain that the smoke-pipe and chimney are absolutely clean. The reason for this is, of course, because of the danger, if there is soot in the chimney, that sooner or later it may fall and obstruct the outlet for the noxious fumes. These witnesses did not say that it was necessarily the duty of the person employed to install the gas-burner, to clean the chimney himself, but if he himself did not clean it, he should tell the occupant to have the chimney cleaned. The essence of the matter, according to these witnesses, is that the burner is not properly installed, ready to light, until it is made certain that there are a clean chimney and flue-pipe through which the fumes from burning gas may continue to escape freely.

The questions put to the jury and their answers were the following:

"Question No. 1: Was there any negligence on the part of the defendant's employees in the installation of the burner in September, 1938, which caused or contributed to the injuries suffered by the plaintiffs in December, 1939? Answer yes or no.

"A. Yes.

"Question No. 2: If the answer to Question 1 is 'Yes', what was such negligence? Answer fully.

"A. The jury find the defendant's employees negligent at the time of the installation of a gas unit in September, 1938, for not cleaning the chimney and fume pipes, or for not advising the plaintiffs to have them cleaned, knowing that coal had been used previously, thereby contributing to the injuries suffered by the plaintiffs in December, 1939.

"Moreover, the jury find that there was more negligence on the part of the defendants on December the 14th, 1939, for not finding the *right trouble*, as we find from the evidence submitted by the witnesses of the defendants and plaintiffs that there could have been no down draught on that day going through to the furnace caused by a ten mile wind.

"Again, had Mr. Jones or Mr. Bareham cleaned this chimney and fume pipe on December 14th, 1939, or ordered Mr. McSweeney to have them cleaned, this misfortune *could* not have happened.

"The jury also find that the condition of the chimney on the outside, either before or after the repairs were done, had no bearing on this accident.

"Question No. 3: Was there any negligence on the part of Mr. or Mrs. McSweeney which caused or contributed to the injuries suffered by the plaintiffs in December, 1939? A. No."

Questions 4 and 5 were not answered.

"Question No. 6: At what amount do you assess the damages of—

"(a) G. W. McSweeney? A. \$3,400.

"(b) Edith McSweeney? A. \$3,000.

"(c) Stewart McSweeney? A. \$ 100."

Upon these answers the learned trial judge subsequently directed judgment to be entered for the plaintiffs for the recovery of the damages assessed by the jury, with costs, including the costs of the former trial.

It is not in dispute that the injuries that the respondents complain of were caused by fumes from the burning of gas, and that these fumes spread throughout the house because the flue-pipe and the chimney were blocked and the fumes, therefore, could not escape in the normal way. The appellants say that they owed no duty to the respondents in the installation of the gas-burner to do more than they did in respect to an outlet for the escape of fumes; that they installed the burner in the furnace as directed and found there a good draught for the escape of fumes up the chimney, and beyond that they had no duty.

The jury appear to have thought otherwise, but, in their answer to Question 2, have the jury assumed some duty owing by the appellants that the evidence does not support, or in their answer to Question 2, and more particularly the first paragraph of it, did they fail to find definitely anything that can amount to a breach of duty contributing to the injuries? Is it enough to say the appellants should have cleaned the chimney or have advised McSweeney to have it done? It may seem a somewhat generous interpretation of this paragraph of the answer to Question 2, but after careful consideration, and not without doubt, I have concluded that it is not going beyond the duty imposed upon the Court to read the answers of the jury in such a way, if possible, that effect can be given to them in the determination of the questions to be tried, to say that the jury found, in effect, that it was the duty of the appellants to see that the outlet for the fumes was clean, and that, particularly in view of their knowledge of the previous use of coal, it was not enough merely to see that the flue-pipe and chimney gave a good draught at the time of installation of the burner. It is plain upon the evidence that the appellants knew that in installing the gas-burner they were making things ready for the burning of gas to be supplied by them for heat. While the application signed by McSweeney for the burner was on a separate form from his application on the same day to be supplied with gas, yet essentially the supplying of the burner and the agreement to supply gas formed parts of one transaction. The burner was installed by the appellants to burn gas that they were to supply as soon as heat was required, and not as an independent matter. There is nothing whatever in the evidence to indicate that either party

had any idea that somebody else, other than the appellants' men, would be brought in to work upon or to look over the heating arrangements before the appellants should light the burner, as they did about two weeks later.

In my opinion the other paragraphs of the answer to Question 2 are not really within the scope of the question. They deal only with later conduct on the part of the appellants, not with anything that can be classed as negligence in the installation of the burner.

If the first paragraph of the answer to Question 2 is to be understood as I have stated, there is evidence to support the answer. Witnesses, to whom I have already referred, gave evidence as to the proper practice in the installation of a gas-burner. The appellants' employee who installed this gas-burner admits that he knew from what he found in the furnace that it had been used for burning coal. He admits that he knew that from the burning of coal soot is deposited in the flue-pipe and in the chimney. He admits that he knew that an accumulation of soot in the flue-pipe or in the chimney may so block them as to prevent the escape of the fumes from burned gas and that asphyxiation of the occupants of the house may result. Yet he made no inspection of the chimney beyond ascertaining that there was a good draught at the time. He did not know what soot was collected or in suspense in the chimney. Yet he does not say that it was not part of his duty to leave the installation with a clean chimney.

The appellants contend further that whatever may be concluded as to negligence on the part of their workman in installing the gas-burner, that was not the cause of the injuries the respondents complain of. They did not happen until a year and three months afterwards. Not only did this long time elapse, but other things intervened that were the real cause, as the appellants contend. For the respondents it is argued that the frequent presence of an odour of gas in the basement indicates that the draught through the chimney and the outlet for fumes were gradually being obstructed by the accumulation of soot, and that complete obstruction was only a matter of time. The respondents further say that the appellants are not in a position to say that the respondents were negligent in not sooner discovering the need for cleaning the chimney, for the appellants them-

selves did not detect it when complaints were made from time to time by the respondents of the odour of gas in the basement, nor even on their inspection on 14th December, 1939. It is not improbable that if it had been known to those concerned on one side or the other, on any of these occasions, that no one had made certain that the chimney was clean before the gas-burner was put in operation, they would have discovered more readily the cause of the trouble. It is not, however, so much to the fact that McSweeny did not himself have his chimney looked after that the appellants point, as it is to the lighting of the burner again on 15th December, 1939, without any test or examination by anyone to see that everything was in proper order after a situation that was possibly dangerous, had developed. This, the appellants contend, was the real cause of the injuries; and they say that the finding of the jury that there was no negligence on the part of either Mr. or Mrs. McSweeny is perverse.

There has been much contention as to what conditions existed when the appellants' men made an inspection on 14th December. The jury, rejecting the evidence of the appellants' witnesses, say there was no down-draught on that occasion. For the appellants it is strongly argued that there could have been no other draught than a draught down the chimney that could, by any possibility, have blown out a lighted match held at the furnace door. If there was such a draught coming down the chimney and through the flue, they were not entirely blocked at that time. Perhaps there is even more satisfactory proof that there was not complete obstruction on the occasion of the inspection on 14th December to be had from the circumstance that the gas was then still burning and had been burning constantly since McSweeny noticed an odour of gas in the basement that morning, and yet no fumes had got upstairs. This is in marked contrast with what happened when Mrs. McSweeny lit the furnace again the next morning. It had not burned long before she fell unconscious to the floor, while telephoning her husband. Notwithstanding the finding of the jury on the matter, it is, I think, impossible to escape the conclusion that there was still a passage open through the flue-pipe and chimney on December 14th when the appellants' men made their inspection. I do not see, however, that it necessarily results that either Mr. or Mrs. McSweeny was negligent on the next day.

What is of more immediate importance in the events of December 14th is what instruction was McSweeney given by the appellants' men at the end of their inspection? It is not disputed that they thought the cracks in the chimney were the cause of the trouble then present, and that they told him so and told him to have the chimney repaired. It is also not in dispute that at some point in their discussion McSweeney was given to understand that it was not safe to use the gas until the chimney was repaired, and for that reason either McSweeney or one of the appellants' men shut off the switch that controlled the supply of gas. McSweeney says the appellants' man Jones further told him that as soon as the cracks in the chimney were repaired, it would be all right to turn the gas on again, and that that was the end of their conversation. Jones says his statement to McSweeney was that McSweeney could call them any hour of the day or night after the chimney had been repaired, and they would come up and check the furnace. Jones is corroborated by Bareham, the appellants' man who was with him.

There is no express finding by the jury upon this conflicting evidence of what McSweeney was told. It would seem to be an almost necessary conclusion from the jury's finding, absolving McSweeney of negligence, that they accepted his evidence as to what his instructions were, for if his instructions were as the appellants' witnesses state, he certainly did not follow them. After the appellants' men had gone on the 14th December McSweeney took his wife down to the basement and showed her the switch and how to operate it. She was not permitted to say in evidence what further he told her, but she says that it was in consequence of what he told her that she turned on the switch and started the furnace again the next day after the repair of the chimney.

Was it perverse on the part of the jury to find that neither McSweeney nor his wife was negligent in connection with the lighting of the furnace without calling upon the appellants, as had been done on other occasions when the furnace was to be lit, and without any inspection whatever, after the trouble of the day before? In considering this question it is also to be remembered that McDonnell had been working at the top of the chimney that morning and may well have done something that contributed to the blocking up of the chimney and flue.

Undoubtedly Mrs. McSweeney was wholly ignorant of the elements of danger in starting the furnace without competent inspection. She does not pretend anything else. She did simply as she had been told to do by her husband, and she understood that she was following the instructions given to him by the appellants' men the day before. What she undertook to do she did efficiently enough. It seems to me that if there was negligence, it was McSweeney's and not hers.

Whether McSweeney was negligent in directing his wife to turn on the switch and start the furnace going as soon as the chimney was repaired, and without further inspection, must, in my opinion, turn mainly upon what the appellants' men said to him on December 14th. If his own evidence of what was said to him is accepted, it is difficult to fasten negligence upon him, for undoubtedly he relied upon the men the appellants had sent. He looked to them as experts in a matter of which he says he had but little knowledge. The jury have not found expressly that McSweeney's account of the conversation is correct, as I have already pointed out, but neither have they found against him. Upon a matter so obviously important to the question of negligence on the part of McSweeney, it is right, I think, to conclude that the jury believed that he was told what he says he was told and not what the appellants' witnesses say he was told.

It is quite evident from their answer to Question 2 that the jury were definitely of the opinion that the appellants' men should have discovered the foul state of the chimney on December 14th. It seems a strange thing that men of experience should have looked everywhere, indoors and outdoors, except in the chimney, to locate the interference with the draught, and the cause of an odour of gas in the basement. These men did not know, however, that the chimney had not been cleaned when the gas-burner was installed. Their conduct suggests definitely that they took it as a matter of course that the chimney had been cleaned before the gas-burner was put in operation, and that it was useless to look for soot in the chimney. If the respondents are believed as to the earlier complaints they say they made, the same observation applies to the inspections by the appellants' men on such occasions. It would seem to relate the whole trouble back to the failure of the man who installed the burner to see that there was a clean chimney to commence with.

Throughout the consideration of this case it is an important factor that the appellants were concerned with the supply of gas, a thing dangerous in itself. In all that had to do with the preparations for the supply of gas, as well as in the supplying of gas, a high degree of care was required, and I am unable to say that the jury were wrong in their finding that that care was not exercised in this case when the gas-burner was installed, and that the respondents' injuries directly arose therefrom. The case of *Dominion Natural Gas Company, Limited v. Collins*, [1909] A.C. 640, is in point on some of the material aspects of this case, notwithstanding important differences in the circumstances.

The appeal should be dismissed with costs.

FISHER J.A.—My Lord the Chief Justice has in his reasons covered with meticulous accuracy all the relevant facts and evidence for consideration in this appeal.

This action is based on negligence, and the learned trial judge submitted to the jury the following question:

“Was there any negligence on the part of the defendant and its employees in the installation of the burner in September, 1938, which caused or contributed to the injuries suffered by the plaintiffs in December, 1939?” and the jury's answer to that question was “Yes.” In addition to that answer, and as a further answer to the question submitted, they found “the defendants' employees negligent at the time of the installation of the gas unit in September, 1938, for not cleaning the chimney and furnace pipes, or for not advising the plaintiffs to have them cleaned, knowing that coal had been used previously, thereby contributing to the injuries suffered by the plaintiffs in 1939.”

The first vital point, as I see it, is, did the Gas Company owe a duty in law after they had completed the installation, in view of the fact that they knew coal had been previously burned in the furnace, either to have advised McSweeney to look to the condition of the chimney and flue, or for the employees of the company to examine the chimney, and, if it required cleaning, to have cleaned it out, or ordered it to be cleaned out, before turning on the gas?

We have here on the one hand the plaintiffs, who were ignorant of the danger that might arise if the chimney and

flue had, through the use of coal, accumulated soot which at some time in the future might fall and choke or clog the chimney and flue, and thereby prevent the escape of fumes, and on the other hand the Gas Company, knowing that coal had been burned in the furnace, making no inquiries as to how long coal had been burned, and well aware that if quantities of soot had accumulated gas would disintegrate it and might cause it to fall and choke the chimney and flue, and that if it did, fumes could not escape and danger might arise therefrom.

On these undisputed facts, was there negligence on the part of the Gas Company or its employees?

Under the application to install the burner, or the contract to supply gas—and these documents must, I think, be considered together—it is clear that there was no obligation on the part of the company to examine the condition of the chimney and if it required cleaning, to clean it out before gas was turned on.

The jury's finding is challenged by the appellants as being a misconception by the jury of the duties resting on the Gas Company with respect to the cleaning of the chimney or advising the plaintiffs to have it cleaned; and on the further ground that the evidence did not warrant the jury's finding. The question is, was there sufficient evidence upon which the jury was justified in basing the finding that there was negligence in not *advising or warning the plaintiffs?*

I think there was ample evidence. Several witnesses were called on behalf of both parties to this litigation, on which to base this particular finding of negligence. Some of the witnesses agreed that it was a reasonable precaution for the company either to have acted, or to have warned or notified the plaintiffs. Several witnesses—including the appellants' experts—swore that it was an ordinary precaution and good practice to have the chimney, if it required it, cleaned out before turning on the gas—the only reason obviously being that an omission might lead to danger. A witness named Allen, an expert called by the appellants, swore that the burning of gas from September, 1938, when the unit was installed, would not produce soot, and that the soot must have been in the chimney at the time the unit was installed, and, therefore, I think there can be no question that there was an accumulation of soot at the time of the installation. McDonnell swore that on the 15th December and after

he had turned off the gas he pulled the pipe out of the chimney and found the pipe and chimney filled with soot and other debris.

I am of opinion that there is sufficient evidence, and, giving effect to the real meaning of the finding of the jury, I agree with them that the omission by the Gas Company, or its employees, to take the precaution to *advise or warn* the plaintiffs—gas being a dangerous element and a high degree of care being necessary—was an act of negligence that caused or contributed to the injuries the plaintiffs suffered from asphyxiation.

I do not refer in more detail to all the evidence, as it is to be found in the reasons of my Lord the Chief Justice.

In view of the foregoing conclusion it becomes unnecessary to discuss the additional findings of the jury, or the contentions of Mr. Tilley, other than his contention that the injuries suffered by the plaintiffs were due to the negligence of Mrs. McSweeney in turning on the gas at the time she did, without first calling the Gas Company to see if it was safe to do so.

It is quite true that the plaintiffs had previously called on the Gas Company to turn on the gas, but in this particular instance the evidence is that Mrs. McSweeney believed that the company's employees, after investigating the cause of the trouble arising on the 14th of December, had located the trouble to be in the cracks at the top of the chimney and that McDonnell had been assigned to the duty of repairing it, and it was only after McDonnell had informed Mrs. McSweeney that he had made the repairs, and she, believing that the Gas Company had discovered the real cause of the trouble, turned on the gas. I do not think that Mrs. McSweeney can in these circumstances—the onus being on the Gas Company—be charged with negligence in turning on the gas at the time she did.

I have not been able to find any direct authority on the point, but on the duty to take care when dealing with a highly dangerous element reference may be had to *Parry v. Smith* (1879), 4 C.P.D. 325, and *Dominion Natural Gas Company, Limited v. Collins*, [1909] A.C. 640.

I agree with my Lord the Chief Justice that this appeal should be dismissed with costs.

GILLANDERS J.A.—I have found the disposition of this appeal not free from difficulty. Had I been faced with the responsibility of determining the issues at the trial I would, I think, have

arrived at a conclusion different from that of the jury, but that is not the question before this Court.

"Thus the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion": *Mechanical and General Inventions Company, Limited, et al. v. Austin*, [1935] A.C. 346, per Lord Wright.

The question whether the defendant's servants under the circumstances known to them used the requisite care in the installation of the equipment, was one for the jury. I hesitate to say that on the facts established by the evidence, negligence may not reasonably be inferred. It was for the jury to say whether or not it ought to be inferred.

The jury's answer to question No. 1 is clear. The answer to question No. 2 presents difficulty. The jury found there was negligence on the part of the defendant's employees in the installation of the burner in September, 1938, which caused or contributed to the injuries of the plaintiff. A good deal of the answer to question No. 2 is gratuitous and not in point. That part of it which is in point, if interpreted strictly, might be open to much objection. However, it is the duty of this Court to interpret the jury's answers liberally in the light of the pleadings, the evidence and the judge's charge.

I agree with the reasons stated by my Lord the Chief Justice and with his conclusion that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, respondents: Clark and Zeron, Windsor.

Solicitors for the defendant, appellant: Kerr, McNevin & Gee, Chatham.

[COURT OF APPEAL.]

Bilecki v. Weber.

Real Property—Improvements on Another's Land—No Right to Retain Land, on Paying Compensation, unless bona fide Mistake Existed as to Ownership—The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 36.

S. 36 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, which provides that a person who makes lasting improvements on land, in the belief that it is his own, shall be entitled to a lien for the enhanced value, or shall be entitled or may be required to retain the land on paying compensation, does not give an absolute right equivalent to a right to expropriate, but is intended merely to protect an innocent wrongdoer against the consequences of a mistake. Where construction is undertaken on another's land, deliberately and with full knowledge of the circumstances, the section gives no right to the person making the construction to acquire the land. *Beaty v. Shaw* (1887), 14 O.A.R. 600; *Gummerson v. Banting* (1871), 18 Gr. 516, referred to.

AN appeal from the judgment of His Honour Judge Clement, of the County Court of the County of Waterloo, in favour of the plaintiff. The facts are fully set out in the judgment now reported.

March 3rd, 1942. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and McTAGUE JJ.A.

R. M. W. Chitty, K.C., for the defendant, appellant: S. 36 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, does not give the plaintiff a right to expropriate, and was not intended to be used as a means of aggression by a trespasser. The first part of the section provides for a purely passive lien, and can only be set up to prevent unjust enrichment of an owner on whose land a stranger has built under a *bona fide* mistake of title. The second part of the section, which was enacted in 1877, is there only so that the Court may work out the proper equities between the parties. It should be noted that it is compensation, not the value of the land, for which the section provides.

The belief required by the section is a *bona fide* belief, and it cannot be based upon an absence of information or lack of inquiry: *Aumann v. McKenzie*, [1928] 3 W.W.R. 233. In this case, the slightest inquiry would have satisfied the plaintiff that she was not the owner of the land she built on. She did not have a *bona fide* belief, but is using the statute as an instrument of fraud.

It is a mistake of title which is contemplated by the section, and the plaintiff's mistake here, if any, is as to the identity of

the property: *Chandler v. Gibson* (1901), 2 O.L.R. 442; *Montreuil v. The Ontario Asphalt Company et al.* (1921), 63 S.C.R. 401, 69 D.L.R. 313.

A. A. Macdonald, K.C., for the plaintiff, respondent: The case was dealt with on the basis of improvements having been made and a lien resulting. The Courts have gone far in interpreting s. 36: *Ward v. Sanderson* (1912), 3 O.W.N. 802, 21 O.W.R. 254, 1 D.L.R. 356. The section refers to "lasting improvements", and this is an erection of a permanent kind.

It is not necessary that the plaintiff's belief should be founded on reasonable grounds, provided it is "honest": 7 C.E.D. (Ont.), 442; *Parent v. Latimer* (1910), 2 O.W.N. 210, 17 O.W.R. 368, affirmed 2 O.W.N. 1159, 19 O.W.R. 461.

The evidence is convincing that the value of this property was less than the amount assessed by the trial judge. In any event, the plaintiff should be required to pay only a reasonable price.

Cur. adv. vult.

March 21st, 1942. The judgment of the Court was delivered by

MCTAGUE J.A.:—This is an appeal from the judgment of His Honour Judge Clement, in the County Court of the County of Waterloo, dated the 13th day of January, 1942, whereby a declaration was made that the plaintiff was entitled to retain the defendant's land, being lot 2 on registered plan 254, in the Township of Waterloo, upon compensating the defendant to the extent of \$200. By the judgment, the plaintiff was given fixed costs of the action.

The plaintiff is the owner of lot 21, plan 254, in the Township of Waterloo. She purchased the land in 1939, and built a house upon it in 1940. In March, 1941, she decided to build a garage and side drive and, in order to do this, to acquire the lot next adjoining to the west. Accordingly she entered into negotiations with one Schmitt, as a result of which she paid a deposit of \$25 on lot 1, according to plan 254, at a purchase price of \$200. She was under the impression she had purchased the adjoining lot to her own property. It turned out that her purchase was of the wrong lot. The lot adjoining, which she intended to purchase, is lot 2 according to plan 254, and is owned by the defendant Weber. Under an erroneous idea as to her rights she

proceeded with the construction of the garage and side drive, partly on Weber's property. When Weber protested, and she then had notice of the encroachment, instead of desisting she went ahead with the construction—certainly from that time on under no mistake of title, but quite deliberately. There were some negotiations which turned out to be unsuccessful. She then issued a writ, evidently on the theory that under s. 36 of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, she had an absolute right to acquire title to Weber's property regardless of his wishes in the matter.

Since the appeal involves a consideration of s. 36 I set it out in full:

“When a person makes lasting improvements on land, under the belief that the land is his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of the land is enhanced by such improvements; or shall be entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court may direct.”

In *Beaty v. Shaw* (1887), 14 O.A.R. 600, is to be found in the judgment of Hagarty C.J.O. a *résumé* of the history of the section. In 1873, the first part of the section, down to the semicolon, was enacted. It was not until 1877 that the second part became law. Prior to 1873, Courts of Equity did in proper circumstances grant relief, to persons who enhanced the value of another's property by putting improvements thereon under mistake of title. *Gummerson v. Banting* (1871), 18 Gr. 516, is an example, and it is suggested in *Beaty v. Shaw* that *Gummerson v. Banting* may have had something to do with the enactment of the second part of the section in 1877. At any rate, before the second part of the section was passed what was granted in a Court of Equity was relief against having to pay for enhanced value to the lands of the legal owner by reason of putting improvements thereon. The person seeking relief, a trespasser at common law, had to invoke the Equity Court as a suppliant and come into the Court with clean hands seeking equity.

The question involved in this appeal is whether the added words, "or shall be entitled or may be required to retain the land if the court is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court may direct", have conferred upon a person in the position of the plaintiff in this case an absolute right outside the field of equity, or whether they merely confer upon the Court a method of dealing with such cases which the Court on its own initiative had not employed before. I think the latter view is to be preferred. What is bestowed by the second part of the section is simply an ancillary power in the Court to deal in a certain way with the statutory lien given by the first part, and not an absolute right to this plaintiff.

To construe the section otherwise would be to place in the hands of the wrong-doer at common law a sword, and not merely to provide him with the shield of a Court of Equity against the consequences of an innocent mistake. Framed as this action is, purely and simply for a declaration that the plaintiff is entitled to acquire and retain either the whole or part of the defendant's property because of her own mistake, without even an assertion of a lien, brings it into the category of an action for the expropriation of the defendant's lands. As a matter of fact the matter was dealt with at trial as if it were an action for expropriation. The section does not warrant a high-handed action of this type. The plaintiff, far from being a seeker of equity, has assumed to herself an arbitrary and absolute role as an expropriator—a convenient method of acquiring somebody else's land.

I can see no justification under the statute for an action such as this. Accordingly I would allow the appeal and dismiss the action with costs here and below.

Appeal allowed with costs and action dismissed with costs.

Solicitors for the plaintiff, respondent: Clement, Hattin & Eastman, Kitchener.

Solicitors for the defendant, appellant: Brock, Weir & Scott, Kitchener.

[HOGG J.]

Austin et al. v. Mascarin et al.*Damages—What Recoverable—Mental Shock affecting Health.**Courts—Stare decisis—Privy Council Judgment, Not in Canadian Case, in Conflict with Later Decision of House of Lords.*

The plaintiffs, husband and wife, were involved in an automobile accident in which their young son was killed. In addition to claims under The Fatal Accidents Act and for the physical injuries to the plaintiffs, the statement of claim contained an allegation that the female plaintiff, as a result of the killing of her son before her eyes, "was profoundly shocked and suffered great mental anguish which has directly affected her health." On a motion to strike out this part of the pleading, *held*, it was a good pleading, and should stand. In view of the later decisions in England (particularly in the House of Lords in *Coyle or Brown v. John Watson, Limited*, [1915] A.C. 1), and of the statement of the Judicial Committee in *Robins v. National Trust Company, Limited*, [1927] A.C. 515, [1927] 1 W.W.R. 692, [1927] 2 D.L.R. 97, as to the binding effect, in a Colonial Court, of a decision of the House of Lords on a matter of English law, it appeared that the decision in *Victorian Railway Commissioners v. Coultas* (1888), 13 App. Cas. 222, should no longer be followed, at least where there was an allegation, as here, that the plaintiff had been affected in her physical well-being. *Toms v. Toronto R.W. Co.* (1910), 22 O.L.R. 204, 12 C.R.C. 126, affirmed (1911), 44 S.C.R. 268, 12 C.R.C. 250; *Negro v. Pietro's Bread Co. Ltd.*, [1933] O.R. 112, [1933] 1 D.L.R. 490; *Purdy v. Woznesensky*, [1937] 2 W.W.R. 116, and other authorities, considered.

A motion by the defendants to strike out a paragraph in the statement of claim in an action for damages arising out of an automobile accident caused, it was alleged, by the negligence of the defendants.

March 6th, 1942. The motion was heard by HOGG J. in Chambers at Toronto.

J. F. McGarry, for the defendants, applicants.

Douglas Haines, for the plaintiffs, respondents.

March 17th, 1942. HOGG J.:—This is a motion for an order to strike out paragraph 8 of the plaintiffs' statement of claim as disclosing no cause of action and upon the ground that it may tend to prejudice or embarrass a fair trial of the action.

The litigation arises out of a collision upon No. 10 highway in Ontario between a motor vehicle driven by the plaintiff Charles Austin and a motor vehicle driven by one of the defendants.

The plaintiffs Charles Austin and Jean Austin sue under The Fatal Accidents Act, R.S.O. 1937, c. 210, on account of the death of their son Robert Austin who was killed as the result

of the mishap, and they sue on their own behalf for personal injuries.

It is claimed that the accident was due to the negligence of the defendant Bitorio Mascarini in the operation of the motor vehicle which he was driving at the time.

Para. 8 of the statement of claim reads: "At the time of the casualty hereinbefore mentioned, the late Robert Austin was riding beside his mother the plaintiff Jean Austin, and before her eyes suffered those injuries which resulted in his death, despite the efforts of the said Jean Austin to shield her child from injury. As a result the said Jean Austin was profoundly shocked and suffered great mental anguish which has directly affected her health."

The defendant contends that the judgment in the well-known case of *Victorian Railway Commissioners v. Coultas* (1888), 13 App. Cas. 222, must be followed by our Courts, and that therefore the plaintiff Jean Austin cannot claim damages on account of nervous or mental shock. It was held in the *Coultas* case that damages in the case of negligent collision must be the natural and reasonable result of the defendant's act; that damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. The appeal in the *Coultas* case was from Australia to the Privy Council and it has been the subject of perhaps more adverse criticism than any decision of recent years both in the Courts in Canada and in England and by legal authorities of recognized weight, such as Sir Frederick Pollock (Law of Torts, 14th ed., p. 39). In Salmond on Torts, 9th ed., p. 369, the opinion is expressed that the decision in the *Coultas* case may be taken as unsound.

In *Dulieu v. White & Sons*, [1901] 2 K.B. 669, it was held that damages which resulted from nervous shock occasioned by fright, though unaccompanied by any actual impact, may be recoverable in an action for negligence where the shock is that which arises from a reasonable fear of immediate personal injury to the claimant. Some years later in *Coyle or Brown v. John Watson, Limited*, [1915] A.C. 1, in the House of Lords, Lord Shaw disapproved of the judgment in the *Coultas* case and held that physical impact or lesion was not a necessary element in the case of recovery of damages in ordinary cases of tort. He said, at p. 13 (referring to the *Coultas* case): "I am humbly

of opinion that the case can no longer be treated as a decision of guiding authority"; and in *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141, in the Court of Appeal, it was held that the limitation imposed in *Dulieu v. White & Sons*, *supra*, was erroneous. Atkin L.J. said, at p. 157: "Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party."

In the recent case of *Owens v. Liverpool Corporation*, [1938] 4 All E.R. 727, in the Court of Appeal, the facts present were that a tramcar collided with a hearse in a funeral procession and overturned the coffin so that it was in danger of falling to the road. The plaintiffs, the relatives of the deceased, were in a carriage following the hearse. One of them actually saw the impact, others saw its effect immediately after the impact happened. The plaintiffs claimed damages for severe shock, and one of them, the aged mother of the deceased, claimed damages for severe shock and collapse. It was held that the right to recover damages for mental shock is not limited to cases in which apprehension as to human safety is involved, but extends to every case for injury by reason of mental shock resulting from the negligent act of the defendant. The plaintiffs were therefore entitled to recover the damages assessed by the judge.

In *Toms v. Toronto R.W. Co.* (1910), 22 O.L.R. 204, 12 C.R.C. 126, in the Court of Appeal, the *Coultas* case was considered a binding authority in Ontario, but it was held that damages might be recovered where the shock was not primarily mental but physical and there was actual impact, and the Court thus distinguished the appeal before it from the *Coultas* case, where there was no actual impact. Garrow J.A., who delivered the judgment of the Court, was of the opinion, while he considered the *Coultas* case a binding authority in this Province, that the situation was not satisfactory. In the Supreme Court of Canada, in the *Toms* case (1911), 44 S.C.R. 268, 12 C.R.C. 250, the view was expressed that the doctrine in the *Coultas* case should be followed only in cases where the facts are indistinguishable from those there considered by the Privy Council. Davies J. at page 277, expressed the opinion that the decision in the *Coultas* case was confined to "damages arising from mere sudden terror unaccompanied by any actual physical injury."

The case of *Negro v. Pietro's Bread Co. Ltd.*, [1933] O.R. 112, [1933] 1 D.L.R. 490, seems to have gone a considerable distance towards adopting the law as it is now in England. The judgment of the Court was delivered by Middleton J.A., and after an exhaustive review of the decisions in point he said that the opinions as to the obligations of our Courts to follow the *Coultas* case were expressed before the decision of the Court of Appeal in England in *Hambrook v. Stokes Bros.*, *supra*, in the year 1925 and before the decision in England in the same Court in *Fanton v. Denville*, 1932] 2 K.B. 309, which indicated that the binding effect of a judgment of the Privy Council was limited to the Courts of the colony from which the appeal is had and did not control the English Court. Middleton J.A. expressed the following view:

"These considerations lead me to the conclusion that it is open to us to refuse to follow the decision of the Australian case which stands alone and which is so adversely criticized and which is out of harmony with the whole trend of the English cases."

In *Robins v. National Trust Company, Limited*, [1927] A.C. 515, [1927] 1 W.W.R. 692, 881, [1927] 2 D.L.R. 97, an appeal from the Court of Appeal for Ontario, Lord Dunedin in delivering the judgment of the Judicial Committee said, at p. 519:

" . . . when an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial Court is concerned by a judgment of this Board."

It is to be assumed that this language included the Courts of a British Dominion as well as those of a British Colony.

The subject under discussion has been considered in two cases in the Court of Appeal of Saskatchewan. In *Hogan et al. v. City of Regina*, [1924] 2 W.W.R. 307, 18 Sask. L.R. 423, [1924] 2 D.L.R. 1211, the plaintiff claimed damages on account of illness and shock. No apparent physical injury was suffered although she had been knocked down in an accident in which

she had seen her two children killed. The Court concluded that the *Coultas* case was to be followed where nervous shock produced only a mental disturbance unaccompanied by physical injuries. In *Purdy v. Woznesensky*, [1937] 2 W.W.R. 116, a woman suffered nervous shock which caused permanent injury to her nervous system, from seeing a violent assault made on her husband. It was said in the judgment in this appeal that the decision in the *Coultas* case was given when the relationship of nervous shock to physical injury was not known or understood as it is today and that the *Coultas* case is no longer a binding authority. It was also held that *Robins v. National Trust Company, Limited*, *supra*, decided that the Court was bound to follow a decision of the House of Lords.

In the case now under discussion, the paragraph complained of in the statement of claim alleges that the plaintiff's health was directly affected on account of the shock she suffered. I take this allegation to mean that the plaintiff has been affected in her physical well-being and has not suffered only from mental shock.

I have come to the conclusion that the paragraph which is the subject of this motion should not be eliminated from the statement of claim.

I think it is of importance, having regard to the more recent decisions on the matter in question in England and in Canada and in the light of the conclusion expressed by Middleton J.A. in the *Negro* case, and the judgment of Davies J. in the *Toms* case, and furthermore in view of the judgments in the *Robins* case, *supra*, and in *Coyle or Brown v. John Watson, Limited*, *supra*, in the House of Lords, that the law should now be definitely clarified and settled in this Province by a pronouncement of the appellate Court, and I would suggest that leave to appeal might be sought in this interlocutory proceeding, which would bring the question before the higher Court in a comparatively simple manner.

The motion is dismissed with costs to the plaintiffs in the cause.

Motion dismissed, costs to the plaintiffs in the cause.

Solicitors for the plaintiffs: Haines & Haines, Toronto.

Solicitor for the defendants: J. F. McGarry, Toronto.

[HOGG J.]

**Norton-Palmer Hotel Limited v. The Windsor Utilities
Commission et al.**

*Negligence—Explosion in Electric Transformer—Evidence of Negligence
—Res ipsa loquitur—Custody and Control of Transformer.*

Contracts—Novation—Substitution of Parties—Inference from Conduct.

The premises of the plaintiff company were damaged by an explosion in an electric transformer. This transformer, with others, was owned and installed by the company and was kept in a locked room or vault in the hotel basement. The defendant commission had a key to this vault, which was delivered to the hotel company's employees whenever it was required. The evidence was not clear whether or not the company also retained a key. The company contended that the Commission was liable for the damages, relying principally on the maxim *res ipsa loquitur*. *Held*, this claim must fail. The maxim did not establish a right of action, but merely asserted a presumption of responsibility; the action must be founded on negligence. *Shawinigan Carbide Company v. Doucet* (1909), 42 S.C.R. 281, at 330, applied; *Corsini v. City of Hamilton*, [1931] O.R. 598, [1931] 4 D.L.R. 313; *Harkies v. Lord Dufferin Hospital*, 66 O.L.R. 572, [1931] 2 D.L.R. 440, referred to. The evidence here failed to establish that exclusive control by the Commission which was necessary to make the maxim applicable; the retention of the key was merely a precautionary measure, taken in compliance with regulations made under statutory authority, to prevent the entry of unauthorized persons into the vault, which was a highly dangerous place. There was no duty, statutory or otherwise, cast upon the defendant Commission to inspect or to maintain any of the company's apparatus or transformers contained in the vault.

Held, further, the company's right of action was barred under the terms of a contract, under which the duty of maintenance of these transformers was clearly cast upon the company rather than the Commission. It was true that neither party to the action was a party to this contract, which had been entered into by the plaintiff's predecessor and by the Windsor Hydro-Electric System, whose assets and liabilities had been taken over by the defendant Commission. But both the present parties had, on their creation, taken over the assets and liabilities of the former bodies, including this contract, and the whole course of conduct was such as to lead to the inference that there had been a novation, the intention of the parties to this action clearly being that the terms of the contract should bind them, and that they should be substituted for the original parties to the contract. *Scarff v. Jardine* (1882), 7 App. Cas. 345, at 351; *The Queen v. Smith* (1883), 10 S.C.R. 1, and other authorities, referred to.

AN action for damages resulting from an explosion in the premises of the plaintiff company. The facts are fully set out in the judgment.

September 24th to October 3rd and October 6th to 10th, 1941. The action was tried by HOGG J. without a jury at Windsor and Toronto.

Roscoe Rodd, K.C., for the plaintiff company.

H. C. Walker, K.C., and *E. L. Haines*, for the defendant Commission.

L. Z. McPherson, for the defendant, the City of Windsor.

March 27th, 1942. HOGG J.:—On 17th August, 1940, an explosion, which had its origin in an electric transformer vault or room situated in the basement of the Norton-Palmer Hotel in the City of Windsor, occurred, causing damage to the hotel premises in the sum of \$53,864.34. This amount has been agreed upon by the several parties to the action.

During the years 1929 and 1930 a vault was constructed by the owners of the hotel premises in the basement of the hotel consisting of two rooms, each of which had its separate door: one of which was required to contain the necessary electric transformers and other equipment pertaining thereto in connection with the supply of electric power for the uses to which it was put in the hotel, and the adjoining room to house the switches controlling such power. In the transformer room, or vault, the hotel company installed and owned eight electric transformers, and the cables, leads, and other devices necessary to conduct electric power as aforesaid, and the defendant Commission installed one transformer, of which they retained the ownership, this latter transformer being necessary in connection with the lighting system of certain shops which formed part of the ground floor of the hotel. Electric power was furnished to the hotel premises from the wires of the defendant Commission at 4,000 volts. The function of a bank of three of the transformers in the above mentioned vault was to "step down" or transform the electric current entering the primary windings of these transformers at 4,000 volts, to 550 volts, and this lower voltage was delivered from the secondary leads or connections of these transformers for the purpose of operating the elevators, the laundry machinery, and certain other machinery forming part of the electrical equipment of the hotel. Each of the three transformers in question was of the capacity of 57 K.V.A. (kilowatt volt amperage).

The explosion which damaged the hotel premises had its origin in the centre or middle transformer of this bank. The evidence establishes that due to a fault or short circuit in one of the primary windings of this transformer, sufficient heat was generated to vaporize a portion of the oil which filled the outer case of the transformer and surrounded and covered the core and the primary and secondary windings of the transformer. There is the opinion of some of the expert witnesses that a

further vaporization of the oil may have been caused by fire in the transformer vault. Oil vapour, becoming mixed with the atmosphere, formed an explosive mixture which, being ignited in some manner either inside of the transformer vault, as is claimed by the plaintiff company, or outside of the transformer vault and in the basement of the hotel premises, as claimed by the defendants, exploded and caused great damage to the hotel building. Part of this damage was evidenced by the blowing out of each of the doors of one of the elevator shafts in the hotel.

The door to the room containing the transformers was locked by a padlock placed on this door when the equipment was first installed in the vault, and a key of the padlock was retained by the defendant Commission.

There is evidence that the transformer vault had been entered on several occasions for the installation of extra equipment and for inspection by electrical contractors and an engineer employed by the hotel company. On these occasions the key was furnished by the defendant Commission.

The evidence establishes that there were also other occasions on which the transformer room must have been entered, but it is not shown how such entry was made, whether by a key obtained from the defendant Commission or by a key in the possession of the hotel company or some of its employees. Whenever the key was requested it was given to the plaintiff company.

The plaintiff claims that the explosion and the damage done to the hotel premises was caused wholly by reason of the negligence of the defendant Commission, upon the grounds that the defendant Commission had the sole custody, care, and control of the transformer room; that this defendant had a duty imposed upon it to inspect and to maintain the transformers and the wiring and other appliances connected therewith; that such inspection was not made, nor was the equipment maintained in a safe and proper condition by the defendant Commission.

The plaintiff also alleges that certain employees of the defendant Commission, who arrived at the hotel immediately before the explosion, were negligent in that they did not shut off the electric power entering the transformer vault in time, but left it connected up to the instant of the explosion.

The plaintiff contends that if the defendant Commission had inspected the transformer in which the fault or short circuit developed, which the evidence establishes was the immediate cause of a certain part of the oil therein becoming vapourized, this defendant would have discovered that this oil contained moisture; that this moisture caused a deterioration of the insulation upon the windings of the primary coil, resulting in a fault or short circuit in one of the turns of this winding, thereby producing heat within the transformer and causing the oil or some of it to vaporize.

The plaintiff sets up the maxim *res ipsa loquitur*, contending that the defendant Commission had control over the equipment in the transformer vault and was responsible for its inspection and maintenance.

I find that the evidence establishes that the transformer vault and an adjacent room containing control switches were designed by architects employed by the plaintiff company; that the electrical equipment and transformers therein, including the transformer which is the material one so far as this action is concerned, with the exception only of one transformer owned and installed in the vault by the defendant Commission itself, were purchased by, and were the property of, the plaintiff company, and that such equipment and transformers were installed by contractors employed by the plaintiff company under the supervision of Mr. J. W. Cockburn, a qualified electrical engineer, also employed either directly by the plaintiff company or through the architects of the plaintiff company. The only evidence of control exercised by the defendant Commission with reference to the said vault or equipment, was the fact that they had a key of the padlock with which the door to the vault containing the transformers, was secured. There is evidence also that upon this door was a sign indicating that it was dangerous to enter the vault. I think the evidence is to the effect that this sign was put on the door by the defendant Commission.

The maxim *res ipsa loquitur* does not establish a right of action but is a rule of evidence. The foundation of the action must be negligence and where the maxim is applicable it merely asserts the existence of a presumption of responsibility.

I think the operation of this rule cannot be more clearly expressed than in the dissenting judgment of Duff J., now Chief

Justice of Canada, in *Shawinigan Carbide Company v. Doucet* (1909), 42 S.C.R. 281, at page 330. This was an action to recover damages for injuries sustained by the plaintiff Doucet, caused by an explosion of a furnace in the plant of the defendant company used as part of the process of manufacturing calcium carbide.

"But there is another view which must be examined, and that is that there is sufficient ground in the circumstances of this case for affirming that the explosion in question was due to some want of care on the part of the appellants, although the specific point in which they failed in their duty is not made to appear. There are many cases in which the fact alone of an accident occurring is held to be a sufficient foundation for such an inference. Speaking broadly, in England and in the United States, this inference is held to be permissible when the injury has been caused by something wholly within the control of the defendant or of persons for whose actions he was responsible, and the occurrence to which the injury was due was not of such a character as would ordinarily take place in the absence of negligence."

The maxim is also expressed in clear terms in *Corsini v. City of Hamilton*, [1931] O.R. 598, [1931] 4 D.L.R. 313; and in *Harkies v. Lord Dufferin Hospital*, 66 O.L.R. 572, [1931] 2 D.L.R. 440.

In order that the doctrine could be applied to the facts now under consideration, the evidence must establish that the transformer and electrical equipment within the transformer vault were wholly within the control of the defendant Commission, and that the Commission had the management of them.

The defendant Commission did not own, had not the management of, and did not use, the transformer in question or the other transformers except the one transformer before mentioned, or the other equipment pertaining thereto. When additional apparatus was installed in the transformer vault, it was purchased by the plaintiff company and set up by contractors employed by them and under the supervision of their own electrical engineer. No request was ever made by the plaintiff to the defendant Commission to inspect or to maintain the electrical equipment.

The Hydro-Electric Power Commission of Ontario by virtue of The Power Commission Act, R.S.O. 1927, c. 57, s. 80(1) (a) (now R.S.O. 1937, c. 62, s. 87(1) (a)), is given power to make rules and regulations prescribing, *inter alia*, the design, construction, installation, and protection of all works or matters used or to be used in the generation, transformation, transmission, distribution, delivery or use of electrical power or energy in Ontario.

In 1928 certain rules and regulations were promulgated by the Hydro-Electric Power Commission. S. 20, Rule 2004, deals with the construction, ventilation, access and other matters pertaining to transformer vaults. Rule 2004(f) provides:

"The door of the vault shall be provided with a substantial lock so that only authorized persons will have access to the vault."

The same provision is found in the rules and regulations of 1939. S. 1 of the rules defines, "authorized person", as "one who by the nature of his duties or occupation is obliged, or who has been instructed, or authorized by those in authority, to approach or handle electrical equipment."

The evidence demonstrates that the electrical equipment contained in the transformer vault in question was of an extremely dangerous character to the life or person of anyone without proper knowledge and training, who might enter the vault.

The protection which the defendant Commission was authorized by statute to give to the contents of the transformer vault was protection of the public generally, and this protection was ensured by locking up and keeping locked the transformer room. *Milligan v. Thorn* (1914), 32 O.L.R. 195. In my view, the defendant Commission had the right to retain in their possession the key which would give access to the door of the transformer vault, in order that they might be assured that the provisions of the rule in question were being carried out. In no other manner did the defendant Commission have control over this vault.

In 1932 the plaintiff company had their electrical engineer, Mr. Cockburn, make a test and inspection of the equipment contained in the vault, including the transformer in which the fault developed, and the key of the vault was obtained from

the defendant Commission to enable the vault to be entered for the aforesaid purpose. There is evidence that additional pieces of equipment such as meters for different purposes were installed in the transformer vault from time to time by the plaintiff company.

I am of the opinion that the maxim *res ipsa loquitur* is not applicable to the circumstances here present, and that there was no duty, either statutory or otherwise, cast upon the defendant Commission to inspect or to maintain any of the plaintiff's apparatus or transformers contained in the transformer vault. Possibly, however, I should deal briefly, in order to make certain findings of fact, with the very lengthy evidence given by highly qualified experts called both by the plaintiff and by the defendant Commission as to the cause of the fault or short circuit which occurred in the primary winding of the transformer in question. The plaintiff endeavoured to show by expert testimony that the defect in the transformer was caused by moisture becoming intermingled with the oil contained in this transformer. Expert witnesses for the defendant gave evidence to the effect that the defect which was found to exist in this transformer could not, owing to the condition of the primary coil after the explosion, be attributed to the presence of moisture having accumulated in the oil; that the transformer itself was of a type which was ordinarily installed upon poles and exposed to all conditions of weather, and that faults due to moisture were of very rare occurrence in transformers of this kind. Expert evidence was adduced by the defendant Commission in an endeavour to establish that the defect which appeared in the transformer was produced by a short circuit in one of the secondary leads or cables connecting the transformer to the hotel equipment operated by the current furnished by this transformer bank.

I find that the plaintiff has not proved that the fault in this transformer was due to moisture or to any other deleterious substance being present in the oil contained therein. The burden of proof is upon the plaintiff, and the plaintiff company has not discharged this *onus*.

The defendant Commission pleads the existence of a contract between Norton-Palmer Hotel Company Limited, the predecessor of the present plaintiff, and the Windsor Hydro-Electric System,

the predecessor of the defendant Commission, as a defence to the action.

On September 26th, 1929, a contract for the supply of electric power to the hotel premises was entered into between Norton-Palmer Hotel Company Limited and the Windsor Hydro-Electric System. Under the terms of this contract electrical energy is to be furnished at the hotel company's premises at the primary power of 4,000 volts. The hotel company agrees to take all electrical energy for power purposes for the term of one year and to pay for the same monthly, and agrees to supply to the Hydro-Electric System, without charge, vault space for the transformers required to furnish electric service to the stores and shops in the hotel building. The contract is subject to certain conditions agreed upon by the parties. Several of these conditions are material to the matters in issue. Condition no. 1 is to the effect that the hotel company shall provide space for the Hydro-Electric System's equipment and that the properly authorized agents of the Hydro-Electric System shall "at all reasonable hours have free access to the said premises for the purpose of reading, examining, repairing or removing their said meters, wires and other material and appliances." Under condition no. 7, the hotel company will provide "all lines on the premises and all lines connecting the premises with the point of delivery and maintain the same in efficient condition with proper devices according to the Rules and Regulations of The Hydro-Electric Power Commission of Ontario." By condition no. 8, the contract shall continue in force until terminated by a notice in writing of at least one month given by either party thereto. By condition no. 9, it is agreed that the signatures of the parties shall be binding upon their successors or assigns. Under condition no. 10, the hotel company agrees not to make any changes in or additions to its apparatus or connected load except with the consent of the Hydro-Electric System, and by condition no. 11, all electrical and mechanical equipment used by the hotel company shall be subject to the reasonable approval of the Hydro-Electric System, and the electrical energy shall be so used as not to endanger the apparatus of the corporation.

On October 31st, 1934, the former hotel company by by-law enacted that the company should sell its undertaking and assets to a new company to be incorporated, the new company to

assume all liabilities except a certain sum owing on second mortgage debentures. On December 14th, 1934, letters patent were issued incorporating the same hotel business under the name of the present (plaintiff) company. On 27th March, 1935, the plaintiff company enacted by by-law that it should purchase all the assets and undertaking of the former company, and assume all the liabilities of that company except a certain amount of mortgage debentures as aforesaid. The charter of the original company was surrendered as of 1st March, 1937.

By s. 21 of The City of Windsor (Amalgamated) Act 1935, 25 Geo. V (Ont.), c. 74, the assets of the Hydro-Electric Commission, on and from the date of final incorporation of the new City of Windsor, are vested in and become the property of the defendant The Windsor Utilities Commission, and by s. 16 of this statute the management, control and operation of the Hydro-Electric System are vested in the Commission.

The plaintiff pleads that the contract in question does not affect the issues in the action and contends that the rights and obligations set up by it are not binding upon the plaintiff as neither the plaintiff company nor the defendant Commission is a party to the contract. This contract was one of the assets, and a valuable asset, of the former Norton-Palmer Hotel Company Limited: it ensured for the hotel premises a supply of electrical energy essential for the operation of the hotel, and it was a contract which by its nature was capable of being assigned, and it became an asset of the plaintiff company. The liability of the former hotel company under the contract was accepted by the plaintiff company and the plaintiff company paid the defendant Commission on the terms of the contract for electrical energy and accepted the discount of 5 per cent. given under the terms of the contract. In all respects the plaintiff acted as if the contract had been entered into by it with the defendant, and observed its provisions. The contract also became an asset and a liability of the defendant Commission and the Commission accepted the liability of the former Hydro-Electric System to supply electrical energy to the hotel premises, continued to do so and looked to the plaintiff for payment. It is true that the contract was between parties who are not parties to this action, but the defendant contends that the whole course of conduct between the parties shows that the intention was

evident that the plaintiff company and the defendant Commission should be substituted in the place of the original parties to the contract and that the terms of the contract should be binding upon the present parties—in other words, that there was a novation. Novation may be inferred from the acts and conduct of the parties and the facts relied on to show a novation must be such as to establish a new contract.

The whole course of conduct between the present parties is sufficient in my opinion to show an evident intent by both the plaintiff and the Commission to deal with each other and to enter into a new contract upon the terms and conditions of the original contract. In my opinion there was a novation. *Scarf v. Jardine* (1882), 7 App. Cas. 351; *The Queen v. Smith* (1883), 10 S.C.R. 1; *Bailey v. Gillies* (1902), 4 O.L.R. 182; *Dansereau and Richelieu Transportation Co. v. Lafrenière*, [1926] S.C.R. 138, [1926] 1 D.L.R. 517; *Dell v. Saunders* (1914), 19 B.C.R. 500, 6 W.W.R. 657, 27 W.L.R. 844, 17 D.L.R. 279, and *Stecker v. Ontario Seed Co. Limited* (1910), 20 O.L.R. 359.

It is evident from an examination of the terms and conditions of the contract of 26th September, 1929, that the transformer vault was under the control of the plaintiff and that it is the plaintiff and not the defendant which is under obligation to maintain the power lines “in proper condition with proper devices” upon the hotel premises, the electrical and mechanical equipment used by the plaintiff being subject to reasonable approval by the defendant. The words “proper devices” must be held, I think, to embrace all electrical equipment necessary to transform the primary power of 4,000 volts into current of a voltage usable for the purposes for which electric power was required in the hotel. In view of the terms of this contract, the plaintiff company cannot maintain its claim that the transformer vault and the equipment therein were under the control of the defendant Commission and that the defendant was under a duty to inspect such equipment after approval for its use had been given, or that the defendant had any obligation to maintain the equipment.

The further ground of negligence set up by the plaintiff company is found in paragraph 6(e) and (f) of the Statement of Claim where it is alleged that the employees of the defendant Commission, on the night of the explosion, after being notified

of the danger, neglected to disconnect the main oil switch in the switch room in time, and that they negligently opened the door of the transformer vault admitting what air was required to form an explosive mixture.

The defendant is not charged with any positive act of negligence but merely with non-feasance in that its employees were inactive until it was too late, in the presence of the danger.

At about 11 o'clock on that night, white smoke was seen issuing from and around the door of the transformer vault, and Campbell, who was employed by the plaintiff company as an engineer and who had charge of the machinery of the hotel, arrived shortly afterwards. The defendant Commission had already been notified by telephone. Eaton, one of the employees of the defendant, arrived a short time after Campbell, who had endeavoured in the meantime to get into communication with officials of the defendant Commission. The door of the switch room was not locked but Campbell did not cut off the current by throwing the main switch in this room. Eaton, in the presence of Campbell, opened the door of the transformer vault for a very short time. Young, another employee of the defendant Commission, then arrived on the scene, and the door of the vault was again opened for a very short time. It was found that there was heat inside the transformer vault; that it was filled with white smoke; that there was an odour of burning insulation, and that the vault could not be entered. There is also evidence that a hissing sound was heard. These two employees of the defendant Commission were not informed that the main switch and the circuit breakers controlling the electric current were installed in the room adjacent to the transformer vault and they determined that the electrical power entering the transformer vault should be disconnected at a pole in an alleyway adjacent to the hotel, from where the defendant Commission's wires ran into the hotel premises, and they proceeded to do this; but before they could disconnect the wires at the pole the explosion occurred.

The plaintiff argued that a duty rested on the defendant Commission to take the necessary and proper steps to prevent the mishap; that the employees of the defendant Commission acted in a negligent manner in not taking steps within a reasonable and proper time to remedy the trouble, and that such negli-

gence was the cause of the explosion. The plaintiff furthermore contended that even if it should be found that there was no duty cast on the employees of the defendant Commission to take steps to deal with the condition existing in the transformer vault on the night in question, nevertheless once they had decided to shut off the electric power they were responsible for not acting in a reasonable and proper manner in so doing, following the principle laid down in *Coggs v. Bernard* (1703), 1 Smith L.C. 6th ed. 177, 2 Ld. Raym. 909.

I cannot find that there was any obligation upon the defendant Commission or its servants either under its contract or at common law or by statute which made it liable to endeavour to prevent the explosion. The employees of the defendant Commission who responded to the call on the night of the explosion were men employed by the defendant Commission to inquire into and rectify minor troubles in connection with the distribution of electrical energy such as the renewal of burnt-out fuses.

I do not think that Eaton and Young acted unreasonably or negligently in opening the door of the vault, as they could only find out by so doing whether the trouble was of a nature with which they could deal. As to the claim that Eaton and Young should at once have shut off the power entering the transformer vault by means of the circuit breakers in the room adjacent to the transformer vault, it is to be recalled that they were not told by Campbell or any one in the employ of the plaintiff company where the handles of the circuit breakers were located; and evidence was given to the effect that the common practice is that the circuit breakers are located in the same vault or room as the transformers and not in a separate or detached room. I do not think that the smoke and the smell of burning insulation warrant the conclusion that the defendant's employees should have known that vaporized oil was present, which when mixed with air might explode. I do not think that the services which these men were employed to render included coping with circumstances of a sudden and unusual emergency such as existed in the transformer vault of the plaintiff company immediately before the explosion, nor do I think that their training, knowledge and experience were such that they could be reasonably expected to act in a manner other than that in which they did act. The judgment in *Stevens-Willson v. The City of Chatham*

and *The Chatham Public Utilities Commission*, [1933] O.R. 305, [1933] 2 D.L.R. 407, affirmed [1934] S.C.R. 353, [1934] 3 D.L.R. 1, is of assistance in a consideration of this issue. I am unable to conclude that they were guilty of the negligence imputed to them in the plaintiff's statement of claim.

It was also argued that it was the duty of the defendant Commission to have shut off the electric current at the sub-station from which a large district in the business section of the City of Windsor was supplied with light and power. This alleged act of negligence is not pleaded, but assuming that it had been pleaded, I think the answer to this allegation is to be found in the judgment of Rose C.J.H.C., in the *Stevens-Willson* case where the source of danger was from the wires of the defendant Utilities Commission, who said at p. 310 ([1933] O.R.):

"The Commission owes a duty, not only to the person whose property is supposed to be in danger, but to all its customers. It cannot unnecessarily shut off power; great inconvenience may be caused by an unnecessary shutdown, and danger of one sort or another may be created."

In that case it was held that the Utilities Commission under the circumstances there present was not negligent in not cutting off the electric power at the Hydro station. In the case at bar it is a part of the electrical equipment of the plaintiff itself which was the primary source of danger, not the wires of the defendant Commission.

It is not necessary to consider the defence of the City of Windsor that the defendant Commission is not its agent.

The action is dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff: Rodd, Wigle, Whiteside & Jasper-son, Windsor.

Solicitors for the defendant Commission: Haines & Haines, Toronto.

Solicitors for the City of Windsor, defendant: L. Z. Mc-Pherson, Windsor.

[COURT OF APPEAL.]

Montreal Trust Company v. Abitibi Power & Paper Company Limited.

Constitutional Law—Bankruptcy and Insolvency—Special Statute Staying Proceedings Continued by Leave of the Court against Company in Liquidation—The Winding-up Act, R.S.C. 1927, c. 213, ss. 21, 136—The Abitibi Power & Paper Company Limited Moratorium Act, 1941 (Ont.), c. 1.

A Dominion company was ordered to be wound up under the provisions of The Winding-up Act, R.S.C. 1927, c. 213. The present action, which was to enforce a bond mortgage, had been brought shortly before the making of the winding-up order, and leave was given, under s. 21 of the Act, to continue it. The action proceeded to trial, and judgment was given for the plaintiff. After an abortive sale of the company's assets, subject to a reserve bid, a motion was made for an order authorizing a sale without a reserve bid. While this motion was pending, the Provincial Legislature enacted The Abitibi Power & Paper Company Limited Moratorium Act, 1941 (Ont.), c. 1, staying all proceedings in the action, and providing that no new action might be brought without the consent of the Attorney-General. *Held*, this Act was *ultra vires*, being an encroachment upon the Dominion's exclusive jurisdiction over bankruptcy and insolvency, and the sale should therefore proceed.

AN appeal, by special leave, from the judgment of Middleton J.A., upon a motion in circumstances described in the above head-note, and in the judgments now reported.

November 27th, 1941. The motion was heard by MIDDLETON J.A. in Chambers at Toronto.

C. F. H. Carson, K.C., and *R. S. F. Johnston*, for the plaintiff.

E. G. McMillan, K.C., for the defendant company.

Hon. G. D. Conant, K.C., Attorney-General, *C. R. Magone, K.C.*, and *A. M. Stewart, K.C.*, for the Province of Ontario.

Glyn Osler, K.C., and *D. G. Guest*, for the individual defendants.

A. G. Slaght, K.C., for the preferred shareholders.

W. Judson, for the common shareholders.

J. L. Stewart, for the general creditors.

December 4th, 1941. MIDDLETON J.A.:—Motion by counsel for the plaintiff for an order authorizing the real and personal property, assets and effects of the defendant Abitibi Power & Paper Company Limited, including its undertaking, rights, privileges and franchises, and including all property and assets in the possession of Geoffrey Teignmouth Clarkson, receiver and manager of the property of the defendant company, to be immediately sold without a reserve bid being fixed, and for such further or other order as may be deemed just; made in the

presence of counsel for the defendants and the various parties interested, as shown by the above representation.

The papers filed indicate a variety of grounds, but before me only one ground of opposition was fully argued.

The report of the Royal Commission inquiring into the affairs of the Abitibi Company was before me. In it, in para. 3, the capital structure of the company is set forth, and in para. 4, the Court proceedings up to the making of the motion. These I take as accurately setting forth the various matters related, and this motion is that referred to as having been made originally before the hearing of the Commissioners. No proceedings, legislative or otherwise, have been taken to give effect to the findings of the Commissioners, or their recommendations, and the question argued was the right of the bondholders of the company in question to proceed with the action therein referred to.

This right depends upon the construction of The Abitibi Power & Paper Company Limited Moratorium Act, 1941 (Ont.), 5 Geo. VI, c. 1, by virtue of which it is contended that the power to proceed with the litigation is at an end. This Act recites that the company was incorporated under the Dominion Companies Act, and owned and operated newsprint mills in the Provinces of Ontario, Quebec and Manitoba, and further, that by indenture of mortgage of June 1st, 1928, the company mortgaged all its assets and undertakings to secure an issue of first mortgage bonds to the Montreal Trust Company, the trustee, and this action is an action to enforce the trusts of that mortgage. The Act then proceeds to recite that it appears that the company made default in payment of the interest due on these mortgage bonds on June 1st, 1932, that nothing has been paid on them, and that action was taken in 1932 by the trust company to enforce its security, and since that time various proceedings have been taken in the Courts, and on June 10th, 1940, an order was made directing the sale of all the undertakings, property and assets of the Abitibi Company, and in pursuance of that order the undertakings, property and assets of the said company were offered for sale by the Master of this Court by public auction, and the sale proved abortive because the only bid received was less than the amount of the reserve bid fixed, and that subsequently an application was made for an order that the said property, assets and effects of the said

company should be immediately sold without a reserve bid being fixed, but the motion was adjourned *sine die*, with leave to bring it on on one week's notice; and that during the Court proceedings above referred to, in the year 1937 the Government of Ontario entered into an agreement with the Montreal Trust Company, the trustees under the bond mortgage, the receiver, and the Abitibi Company, acting by its liquidator, which provided that the Government would renew certain agreements if the company was reorganized or rearranged, or if its assets were sold to a new company on a basis sanctioned by the Supreme Court, and in any case on a basis satisfactory to the Government, within one year from the date of the said agreement, or within such further time as the Government might consent; and whereas by an Order-in-Council dated March 9th, 1939, it was provided that when a reorganization or rearrangement was duly completed, or when a sale of the entire undertaking and assets of the said company was duly approved and directed by the Supreme Court of Ontario, and a sale was duly completed, it should be deemed a basis satisfactory to the Government; and whereas the said Order-in-Council was rescinded by an Order-in-Council of October 24th, 1940.

And whereas a Royal Commission was appointed to inquire into the affairs and financial and corporate structure of the Abitibi Company, with a view to recommending an equitable plan for solving the financial difficulties of the company, so that the company might be in a position to meet the conditions, regulations and restrictions which the Lieutenant-Governor in Council might consider necessary upon the grant or renewal of the recited leases, licences, and water-power rights, and generally to make such recommendations in the premises as appeared to be in the best interests of all parties, including the Province of Ontario; and whereas the Commission has reported to the Lieutenant-Governor in Council, *inter alia*, that existing legislation relevant to the reorganization of companies is inadequate to meet situations that arise when the company in question is in financial difficulties; that the said company is dependent for its supply of pulpwood upon the Crown lands of the Province of Ontario, and that it also requires large quantities of power in respect of which it is dependent upon leases from the Province of Ontario, and that the assistance of the Government must be

a largely contributing factor in the success of the enterprise, and that the Government would be justified in trying to secure the carrying out of the purposes which led to the making of the various agreements, and to protect the legitimate interests of persons who have contributed to or are bound up with the conduct of the enterprise; and that whatever the potential value of the undertaking and assets of the said company might be, no price could be obtained for the undertakings and assets, under present conditions, which would begin to approach the amount of the outstanding bonds with interest thereon, and that if the present rate of earnings maintained for some time to come, the shareholders might well have a substantial equity in the property.

These recitals are taken from the Act. It is then enacted:

S. 1. In so far as any property, real or personal, in Ontario is concerned no further proceedings shall be taken or continued under a certain Order of the Supreme Court of Ontario dated June 10th, 1940, directing that a sale of the undertaking, property and assets of the Abitibi Company under the mortgage in question shall be proceeded with. S. 2. Excepting under the operation of s. 1 hereof, without the consent in writing of the Attorney-General, no new action shall be brought for the purpose of realizing on the security situate in the Province of Ontario under the said mortgage, and no further steps shall be taken or order made in the action now pending in the Supreme Court of Ontario under the said mortgage. S. 3. The Order-in-Council dated October 24th, 1940, rescinding the Order-in-Council of 9th March, 1939, with respect to the agreement made between the Government and the Abitibi Company and the Montreal Trust Company, trustee under the bond mortgage, is declared to be valid and binding and effectually to rescind the said Order-in-Council of 9th March, 1939, notwithstanding any lack of notice in writing, or lack of sufficient notice in writing to the parties of the third part. S. 4. This Act shall come into force on a day to be named by the Lieutenant-Governor by his proclamation, and when proclaimed the Lieutenant-Governor in Council may at any time terminate the operation of this Act, but subject to the operation of any Order-in-Council terminating its operation, this Act shall remain in force until the 31st day of December, 1942.

There are no provisions in the Act other than these. It will be noticed that the Act is not complete in itself, or deliberately ignores the facts recited.

The Act does not in itself go beyond fixing a date at which its operation is to terminate—31st December, 1942—and it is impossible for the Attorney-General to state the intention of the Legislature in so providing. That is like a provision contained in the other Moratorium Acts, and it may well be followed by provisions in Acts passed by the Legislature in the year 1942 and subsequent years, continuing its operation.

Upon this motion the validity of this Act is challenged.

In the litigation recited is the winding-up order. This was made under an Act of the Dominion Parliament relating to the matters in question. It is in that Act provided that there shall be no proceedings by a secured creditor save as permitted by the Court. Pursuant to this Act, leave was obtained by the Montreal Trust Company to proceed under its mortgage, and a direction was given as to the mode of procedure, *i.e.*, it was stated by implication that it was to be in accordance with the orders and rules of practice that were in existence at the date of the application.

The application for a receiver and manager was made by the Montreal Trust Company. It sought to invoke the powers of the Court to appoint a receiver and manager for the purpose contemplated, to wit, the operation and management of the company and its foreclosure under the terms of the bond mortgage. These terms require it to operate, not only in this Province, but as well in the sister Provinces of Quebec and Manitoba. Operations of the company were carried on, if that is material, in these Provinces, as well as in the Province of Ontario. I think it is impossible to suppose that the company, operating under a Dominion Act, should seek to obtain permission under the Provincial Act limited in any way by the terms that might be imposed by the Legislature of the Province not contained in the Act.

It follows from this that the legislation passed subsequently by the Province did not operate to restrict the leave granted by the Dominion Court under the Dominion Act, and therefore the Act was, as I have said, *ultra vires*, in so far as it seeks to control or limit the powers of the Court.

I therefore make the order sought—any terms may be spoken to. The applicants may add their costs to their claims.

December 17th, 1941. The defendant company applied for leave to appeal, and the motion was heard by ROACH J. in Chambers at Toronto.

D. L. McCarthy, K.C., and *E. G. McMillan, K.C.*, for the defendant company.

W. N. Tilley, K.C., and *R. W. S. Johnston, K.C.*, for the plaintiff.

C. R. Magone, K.C., for the Attorney-General.

R. I. Ferguson, K.C., for the preference shareholders.

W. Judson, for the common shareholders.

D. G. Guest, for the bondholders' protective committee.

January 2nd, 1942. ROACH J. (after setting out the nature of the motion, and the history of the proceedings):—On the motion before me the circumstances or conditions justifying the granting of leave to appeal could be only those set out in Rule 493(3) (b), which reads as follows:

“(3) Leave to appeal shall not be granted unless,—(b) There appears to the judge hearing the application to be good reason to doubt the correctness of the decision or order in question and the appeal involves matters of such importance that in the opinion of the judge leave to appeal should be given.”

Dealing with these conditions in reverse order, I have no hesitation in stating that in my opinion there are matters of such importance involved here that, subject to the other condition relating to the correctness of the decision, leave to appeal should be given.

Turning then to the primary essential, namely, “good reason to doubt the correctness of the decision or order”, this involves a consideration of the Act. . . . [His Lordship here set out some of the recitals and ss. 1, 2 and 4 of the Act, and proceeded:]

Perhaps it would be well if I at once stated the conclusion at which I have arrived as to the correctness of the decision of Middleton J.A., and then gave my reasons for such conclusion. My conclusion is, with great respect, that there is good reason to doubt the correctness of that decision. Now for my reasons:

Assume, for the purposes of analysis, that proceedings had not been taken under The Winding-up Act, R.S.C. 1927, c. 213, and that this action had been pending. In those circumstances

could the Legislature of the Province have passed the Act in question? I should have thought that it could, on the basis that the pith and substance of the Act is this—it is legislation postponing the plaintiff's right to proceed in an action in the Courts of the Province. It is a civil right over which the Legislature has control under the headings "Property and Civil Rights" and "Administration of Justice in the Province". I call it a postponement because the stay thereby imposed will be removed when the term of the Act expires, *viz.*, on December 31st, 1942, if not earlier. The purpose of the postponement is stated in the recitals in the Act, *viz.*, "that an opportunity may be given to all parties concerned to consider the Plan submitted in the Report of the said Royal Commission." That Report stated that "the assistance of the Government" was necessary to the success of the enterprise and, in substance, that the "legitimate interests" of all persons who had contributed to the enterprise should be protected.

During the argument Mr. Tilley referred me to the recent judgment of the Supreme Court of Canada in *Reference re Debt Adjustment Act, 1937 (Alta.)* [now reported, [1942] S.C.R. 31, [1942] 1 D.L.R. 1], and I was furnished with a copy of the reasons for judgment. Under that Act, s. 8(1)(a), "no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforceable by virtue of any rule of law or equity or by virtue of any statute, except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services" shall be taken without a permit first being given by the Board thereby created. In his judgment, Duff C.J.C. says,—“The distinction between right and remedy is often a useful distinction but an enactment which takes away the remedy by action, which the law otherwise would give to the creditor in respect of his debt, and substitutes therefor the chance of obtaining, by the arbitrary act of a public authority, permission to enforce a remedy is, I think, something more than an enactment relating to procedure.” Mr. Tilley adopted these words and argued that they fitted the case at bar exactly. There is force in Mr. Tilley's argument, but I think I perceive a distinction between the two Acts. It is true that in each case an arbitrary power is vested in a person or persons in authority, but in the

Ontario statute it is temporary, while in the Alberta statute it would have no termination until the Act was repealed. Of the Alberta statute it could be said that it extinguished the right; of the Ontario statute, the most, perhaps, that can be said is that it postpones the right of action.

The winding-up order operated as a stay of this action by reason of s. 21 of The Winding-up Act, which reads as follows:

"After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes."

As already stated, leave was obtained by the plaintiff under s. 21 to continue this action. The Court having charge of the winding-up is a Dominion Court; the Court in which this action was pending is a Provincial Court. The Dominion Court having granted leave to the plaintiff to invoke the jurisdiction of the Provincial Court, I should think that the plaintiff in that forum must submit to such rules and regulations as to procedure as the Provincial Legislature which has jurisdiction might thereafter impose. If that proposition is sound and if the 1941 Provincial Act is an Act relating to procedure, then the plaintiff is bound by it.

For the reasons above stated, I think, with respect, that there are good reasons to doubt the correctness of Middleton J.A.'s order, and leave to appeal therefrom is accordingly granted, costs to be costs in the appeal.

February 5th and 6th, 1942. The appeal was heard by RIDDELL, FISHER and HENDERSON JJ.A., HOGG J. and GILLANDERS J.A.

W. N. Tilley, K.C., for the plaintiff, respondent, raised a preliminary objection that, the appeal being one from an interlocutory order, and not an appeal as of right, the Court should not review any discretionary matters, unless an important point of law was involved.

A. G. Slaght, K.C., on this point, submitted that the appeal was unrestricted.

RIDDELL J.A.: Judgment on the preliminary objection is reserved.

D. L. McCarthy, K.C. (*E. G. McMillan, K.C.*, with him), for the defendant company, appellant, reviewed the operations of

the company, showing the increase in the net working capital in the preceding five years, and the increase in net earnings during the same period.

The appeal from the order of Middleton J.A. is on two grounds: (1) that the statute in question is valid; and (2) that, on the merits, no sale should be directed.

Hon. G. D. Conant, K.C., Attorney-General: Particular attention should be directed to the recital in the Act as to the appointment of the Royal Commission, and its purpose, *viz.*, “to enquire into the affairs and financial and corporate structure . . . so that the Company may be in a position to meet conditions, regulations and restrictions which the Lieutenant-Governor in Council may consider necessary upon the grant or renewal of the . . . leases, licenses”, etc. The Act is fundamentally for the management of the Crown lands of the Province. If, incidentally to the real object of the Act, some security holders are affected, that does not affect the position in considering the intention of the Legislature.

The Act is not broader in its terms than many general Acts. It is not made invalid merely by the fact that it refers to a particular mortgage and company. Its validity is not affected by the fact that it was enacted during the pendency of the present litigation: *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited* (1908), 18 O.L.R. 275 (affirmed 43 O.L.R. 474, 102 L.T. 375).

Many Acts of the Province, such as The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, The Mortgages Act, R.S.O. 1937, c. 155, and The Short Forms of Conveyances Act, R.S.O. 1937, c. 158, might affect the administration of The Bankruptcy Act, R.S.C. 1927, c. 11, but the Province is not thereby deprived of the power to enact them. This Act is similar to The Mortgagors' and Purchasers' Relief Act, 1933 (Ont.), c. 35, which, although it might be said to conflict with Dominion legislation, has not been declared invalid.

The Act comes within one or all of the following heads of s. 92 of The British North America Act: 5, management of the public lands belonging to the Province; 13, property and civil rights in the Province; and 14, the administration of justice in the Province, including procedure in civil matters.

A. M. Stewart, K.C., for the Attorney-General: The Act is valid as dealing with property and civil rights. It deals with the mortgage security, and the enforcement of a mortgage security does not come within the general term bankruptcy legislation, or within the provisions of The Winding-up Act, R.S.C. 1927, c. 213, and particularly s. 21 thereof: *In re David Lloyd & Co.* (1877), 6 Ch. D. 339, at 345. It is not a necessary part of a bankruptcy scheme to include secured creditors. Legislation by the Dominion in the field of bankruptcy and insolvency may affect the security, but it is valid only when properly ancillary to a bankruptcy scheme: *Re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75; *Re Farmers' Creditors Arrangement Act, 1934*, [1936] S.C.R. 384, 17 C.B.R. 359, [1936] 3 D.L.R. 610, affirmed, *sub nom. Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 391, 18 C.B.R. 217, [1937] 1 W.W.R. 320.

There is an area in which the Dominion and Provincial jurisdictions may overlap, in which case neither is precluded from legislating if the field is clear, but if it is not clear, Dominion legislation must prevail. *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189; *Attorney-General for Canada v. Attorney-General for British Columbia*, [1930] A.C. 111, [1929] 3 W.W.R. 449, [1930] 1 D.L.R. 194; *Montreal Trust Company v. Abitibi Power and Paper Company Limited*, [1938] O.R. 81, 19 C.B.R. 179, [1938] 1 D.L.R. 548, affirmed [1938] O.R. 589, 20 C.B.R. 32, [1938] 4 D.L.R. 529.

The legislation is invalidated only if there is a definite conflict with Dominion legislation. *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348, at 369-370; *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, 76 C.C.C. 227, [1941] 3 D.L.R. 305; *Forbes v. Attorney-General for Manitoba*, [1937] A.C. 260, [1937] 1 W.W.R. 167, [1937] 1 D.L.R. 289; *Great West Saddlery Company, Limited v. The King*, [1921] 2 A.C. 91, [1921] 1 W.W.R. 1034, 58 D.L.R. 1.

The fact that insolvency existed, and may have been the reason for the Provincial legislation, has no bearing on the question of validity. *Ladore v. Bennett*, [1939] A.C. 468, 21 C.B.R. 1, [1939] 2 W.W.R. 566, [1939] 3 D.L.R. 1; *Day v. City of*

Victoria, [1938] 3 W.W.R. 161, 53 B.C.R. 140, [1938] 4 D.L.R. 345; *Reference Re Debt Adjustment Act, 1937 (Alta.)*, [1942] S.C.R. 31, [1942] 1 D.L.R. 1, at 8-9.

C. R. Magone, K.C., for the Attorney-General: The company's property is in the Province, and is in the hands of the receiver appointed in this action; the liquidator has no property with which he can deal. The Moratorium Act deals only with the matter of procedure, and is therefore within s. 92(14) of The British North America Act. It does not attempt to destroy the rights of persons or companies, although the Province has power to do that: *Ottawa Valley Power Company v. The Hydro-Electric Power Commission*, [1937] O.R. 265, [1936] 4 D.L.R. 594; *Township of Sandwich East v. Union Natural Gas Co.*, 56 O.L.R. 399, at 504, [1925] 2 D.L.R. 707; *Irwin v. Attorney-General for Ontario*, [1932] O.R. 490, at 494, [1932] 3 D.L.R. 668.

The action to realize on the security of a mortgage in Ontario is a right wholly within the Province, and the Province has power to destroy that right: *Smith v. City of London* (1909), 20 O.L.R. 133, at 138; *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited* (1909), 18 O.L.R. 275, at 279, 292; *Toronto General Trusts Corporation v. The King*, [1919] A.C. 679, [1919] 2 W.W.R. 354, 46 D.L.R. 318.

Had the Act gone further, and attempted to implement the plan of the Royal Commission, it would have been *ultra vires*. The object of the Act, as appears from the recitals, is wholly in the nature of a moratorium, and that field has not been occupied by the Dominion.

The Act is similar to the one considered and upheld as procedural in *Merchants Bank of Canada v. Eliot*, [1918] 1 W.W.R. 698; *Leroux v. Brown* (1852), 12 C.B. 801, 138 E.R. 1119; *Madison v. Alderson* (1883), 8 App. Cas. 467, at 488; *Bowes Co. Ltd. v. American Railway Express Co.* (1924), 26 O.W.N. 290; *Bondholders Securities Corporation v. Manville*, [1933] 3 W.W.R. 1, [1933] 4 D.L.R. 699.

A. G. Slaght, K.C., for the preference shareholders: Preferred shareholders and bondholders alike invested their money, which was used to purchase the assets of the company. The order of Middleton J.A. will have the effect of wiping out our investment. The sale ordered will be a foreclosure in favour of the bond-

holders, and there are many shareholders in England and the United States who will be unable to make an offer for the business. A plan of reorganization should be adopted, so that the shareholders may keep some interest in the company. The company is now more prosperous than ever before, and its prospects are good.

W. Judson, for the common shareholders, did not argue, but submitted a written memorandum.

J. L. Stewart appeared for the general creditors, but did not argue.

W. N. Tilley, K.C., for the plaintiff, respondent: The recitals in the Act must be considered in order to ascertain its purposes.

The Legislature cannot take away rights unless they are wholly Provincial: *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, at 132-133, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433; *Attorney-General for Alberta and Winstanley v. Atlas Lumber Company Limited*, [1941] S.C.R. 87, at 109, [1941] 1 D.L.R. 625. If it cannot put an end to those rights, it cannot delay their effect, and the mere fact that the legislation is temporary makes no difference; the Province cannot do indirectly what it cannot do directly: *Reference Re Debt Adjustment Act, 1937 (Alta.)*, *supra*.

These proceedings might be delayed by the Court, but not by the Legislature. The Legislature has no power to prevent persons coming to the King's Courts for justice: *Reference Re Debt Adjustment Act, 1937 (Alta.)*, *supra*, shows that there need not be a definite clash in the legislation.

The Winding-up Act, R.S.C. 1927, c. 213, by its terms defines the Court in Ontario which is given jurisdiction under it. By s. 21 the discretion to grant leave to proceed is given to that Court. The order granting leave in the present case merely removed the statutory stay of proceedings, but did not confer the jurisdiction assumed in this case for the Provincial Legislature. All the proceedings here show that the Province was attempting to interfere with matters of bankruptcy.

As to the effect of Dominion and Provincial legislation in the same field, see *Montreal Trust Company v. Abitibi Power and Paper Company Limited*, [1938] O.R. 81, per McTague J.A. at p. 88, 19 C.B.R. 179, [1938] 1 D.L.R. 548, affirmed [1938] O.R. 589, 20 C.B.R. 32, [1938] 4 D.L.R. 529; *Royal Bank of*

Canada v. Larue, [1928] A.C. 187, at 196-197, 8 C.B.R. 579, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945.

As to the merits, we are entitled to have a sale now, and not to be required to wait until some time in the future, when earnings may improve. The future prospects are uncertain.

See also *Attorney-General for Quebec v. Nipissing Central Railway Company et al.*, [1926] A.C. 715, [1926] 2 W.W.R. 552, 32 C.R.C. 96, [1926] 3 D.L.R. 545; *Board of Trustees of The Lethbridge Northern Irrigation District v. Independent Order of Foresters*, [1940] A.C. 513, at 532-3, [1940] 1 W.W.R. 502, [1940] 2 D.L.R. 273.

Glyn Osler, K.C. (*D. G. Guest* with him), for the individual defendants: If the Court is now to consider the propriety of having a sale, many matters would have to be taken into consideration.

D. L. McCarthy, K.C., in reply: In an ordinary mortgage foreclosure action, the Legislature can, as of right, order a moratorium. In the case at bar, it is argued that The Winding-up Act takes away that right, but this action is proceeding after leave granted under that Act. The Alberta legislation recently considered by the Supreme Court was quite different, in that there the Legislature was attempting to usurp powers definitely provided for under Dominion statutes. Here the Legislature is attempting to assist the defendant company by suggesting a plan, but is not endeavouring to usurp the functions of the Court, as defined by The Winding-up Act.

As to the propriety of a sale, the Court can always grant relief if it thinks the circumstances are extraordinary: 7 C.E.D. (Ont.), p. 554; *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Company* (1879), 4 App. Cas. 391; *British Columbia Land and Investment Agency v. Ishitaka* (1911), 45 S.C.R. 302.

A. M. Stewart, K.C., in reply: In the Alberta Debt Adjustment Act, 1937, s. 26 was directly in conflict with a Dominion statute, and Duff C.J.C. said that the Act struck directly at the creditor's rights. Here there is no interference by the Act in question with Dominion legislation.

C. R. Magone, K.C., in reply, referred to *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited*, *supra*; *St. Catharines v. Hydro-Electric Power Commission*, [1930] 1 D.L.R. 409; and

Ottawa Valley Power Company v. The Hydro-Electric Power Commission, [1937] O.R. 265, [1936] 4 D.L.R. 594, and distinguished *Re Alberta Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, affirmed *sub nom. Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433.

Cur. adv. vult.

March 21st, 1942. RIDDELL J.A.:—While this case primarily affects only the parties, it is not without importance in the general law of the Province. The appeal was argued at great—not too great—length, with quotation of many authorities, and, I must add, with candour, by all counsel.

Fortunately, the facts are not in dispute.

The defendant, the Abitibi Power & Paper Company Limited, is a company incorporated by Letters Patent of the Dominion of Canada, and is possessed of a very considerable extent of valuable real estate in Ontario, as well as of certain personal property in the form of bonds of other companies in the same line of business. In 1928 it executed a mortgage to the plaintiff, securing its first mortgage bonds.

Certain bonds becoming due in June, 1932, the plaintiff brought an action on September 10th, 1932, for the enforcement of the mortgage, and in that action Mr. Clarkson was appointed receiver and manager on behalf of the plaintiff and all other parties interested in the bonds. Shortly thereafter, the defendant was declared an incorporated company within The Winding-up Act, R.S.C. 1927, c. 213, and to be insolvent; and, liable as it was to be wound up under the provisions of that Act, it was ordered to be wound up. The plaintiff being given leave to proceed with its action, a trial was had in November, 1937, in which it was held that the mortgage was valid and the plaintiff was entitled to a first charge on the assets of the company. An order was made in June, 1940, for the sale of the assets of the company, but this proved abortive, the reserve bid not being reached at the bidding. Then a motion was made for an order for sale without a reserve bid—this motion was postponed at the request of the Attorney-General, until a Royal Commission which had been appointed by the Crown had had an opportunity to examine into the matter, and report. The Commission reported in April, 1941—the Report is before us,

but it has no bearing upon the matter to be determined on this appeal. However, after the Report was made, an Act, Statutes of Ontario, 1941, c. 1, was assented to by the representative of the Crown which, *inter alia*, stayed proceedings "in order that an opportunity may be given to all parties concerned to consider the Plan submitted in the Report of the Royal Commission"; and, subsequently, a proclamation was issued bringing that staying Act into force.

The creditors were not satisfied with this method of dealing with their rights, and launched a motion to have the Act declared *ultra vires* the Province.

The motion came on before Middleton J.A., who, on December 4th, 1941, adjudged the offending sections of the Act *ultra vires*, and ordered the property of the company to be sold under the direction of the Master of the Supreme Court.

An appeal is now taken to us, by leave granted by Roach J. I do not propose to deal with the reasons of Roach J., but assume that the matter is properly before us.

Nor do I question the principles laid down in such cases as *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited* (1908), 18 O.L.R. 275; *Irwin v. Attorney-General for Ontario*, [1932] O.R. 490, [1932] 3 D.L.R. 668; *Smith v. City of London* (1909), 20 O.L.R. 133. It is clear on binding authority that in matters within its jurisdiction, the Legislature has the powers of Parliament and its powers are practically paramount.

But I find myself bound to accept the conclusions of Middleton J.A. that in the present case the Legislature is—no doubt with the best of intentions—interfering in matters beyond its control. I adopt the reasoning and the conclusions of the learned judge, and would dismiss this appeal with costs.

I should perhaps add that I have examined the numerous authorities cited; they, as a rule, have but an indirect bearing upon the question in this appeal, but all deserve, and, I trust, have received, careful consideration.

FISHER J.A.:—Appeal is taken—by leave granted—to this Court from the judgment of Middleton J.A. dated December 4th, 1941, declaring The Abitibi Power & Paper Company Limited Moratorium Act, 1941, c. 1, *ultra vires* the Province of Ontario, and ordering a sale by public auction, subject to a reserve bid, under the directions of the Master of the Supreme Court of

Ontario, of all the property and assets covered by a mortgage given by the company to the Montreal Trust Company dated June 1st, 1928, securing the first mortgage bonds issued by the Abitibi Company.

It appears that the company became financially involved and defaulted in the payment of the bond interest due June 1st, 1932, and an action was commenced in the Supreme Court of Ontario in September, 1932, for the enforcement of the mortgage. Thereafter an application was made in the action, and G. T. Clarkson was appointed receiver and manager on behalf of the Montreal Trust Company, of all the assets of the Abitibi Company. On September 26th, 1932, the Company was declared insolvent within the provisions of The Winding-up Act, R.S.C. 1927, c. 213. On December 7th, 1932, leave under s. 21 of The Winding-up Act was given to the plaintiff by the late Garrow J. to proceed, notwithstanding The Winding-up Act, with the action commenced for the enforcement of the mortgage. The action was tried by the late Kingstone J. in November, 1937, and at the trial the validity of the mortgage was contested by the liquidator. The trial judge gave judgment declaring that the bondholders were entitled to a first charge on the assets of the company, and also that the trusts of the bond mortgage should be carried out. (Reference to what took place in the intervening years, relative to an attempt at reorganization of the company, is unnecessary). Subsequently, on June 10th, 1940, an order was made directing a sale at public auction of the assets of the company, at which bondholders were entitled to bid and, if they desired, to become purchasers. At the sale on October 16th, 1940, the Master certified that only one bid of \$30,000,000 was made, and as that sum was less than the reserve bid fixed, the sale was declared abortive.

Subsequently a motion for another sale was made, and was adjourned *sine die*, and it is at this stage that the Legislature of the Province, having interests in certain lands, leases, licenses and water and power rights, etc., connected with the property covered by the mortgage, intervened and appointed a commission to inquire into the financial condition of the company with a view of recommending an equitable plan for solving its financial difficulties and generally to make such recommendation in the best interests of all parties concerned, including the Province.

The Commissioners' report was received on March 17th, 1940, and thereafter the Act now attacked was passed on November 9th, 1941, and upon another motion being made for the sale of the assets of the company, a proclamation was issued on October 11th, 1941, bringing the Act into effect.

Some of the recommendations of the Commissioners as set out in the report were: that it would be advisable to withhold the property from sale for a certain period for the purpose of enabling the company to work out its financial situation, coupled with the hope that the earnings of the company would in time give the shareholders a substantial equity; and that there should be an extension of time for the maturity of the bonds until 1965, and in the meantime that Mr. Clarkson should be continued as receiver. If the validity of the Act is to be upheld, the recommendation of continuing Mr. Clarkson is, I think, a good one, as under his able and efficient management considerable money has been made in recent years, so much so that \$6,274,000.70 was ordered to be distributed among all the bondholders on account of principal.

During the argument Mr. Tilley pointed out that as things now stood about 85 per cent. of the bondholders desired to proceed and realize on the security and could not, and that if the recommendations of the Commissioners were adopted all proceedings to realize would be held up for an indefinite period on a pure gamble that the future would produce favourable results. Mr. Slaght argued for delay on equitable grounds, but if there are any such grounds, delay, in my opinion, would involve a great risk. If conditions are favourable for a long period of time, that no doubt would enure to the benefit of the objecting minority, to the shareholders and creditors, but what about the length of time they would have to wait, and the risks of unfavourable conditions arising? It is also possible that instead of prosperity there might be adversity in trade and a decline in values. All these, as I see it, are risks that might be attended with serious results, and one of the questions is whether there is any certainty that there would be on the market a purchaser at some future time at as much as \$30,000,000, and if not who would be the sufferers? In this connection—although it is not for the Court to question the reason for, and the wisdom of, the legislation—I am unable to understand the attitude

of the Province in intervening, because it appears to me that the interests of the Province in the lands, leases, power rights, etc. would be in a safe, if not a safer position under a purchaser of \$30,000,000 operating the different properties, than continuing to struggle on for an indefinite length of time on a pure gamble that favourable conditions would arise, and under a load of \$80,000,000, and perhaps an increase thereof.

It is not to be overlooked that these minority shareholders when they purchased their bonds in the market assumed the same risks as the majority, and all purchases by investors no doubt were made in the hope that the company would succeed and their investments would prove profitable, and for these reasons, as I have stated, I have failed to discover any merit in delay, with all its uncertainties, on equitable grounds. It is not, as I have stated, for this Court to consider the wisdom of the legislation and whether any or all of the recommendations of the Commissioners influenced the Legislature in passing the Act, because they have no direct bearing on the determination of the validity of the Act.

Briefly, Mr. Stewart's contentions are that the security of a secured creditor and its enforcement does not fall within bankruptcy legislation; that a secured creditor makes his claim, not against the debtor, but against his own property; that the 1941 Act does not conflict with the operation of The Winding-up Act or encroach upon it, and that the object and effect of s. 21 of The Winding-up Act was to secure an orderly working out of interests as between a secured creditor and the liquidator, and that it is therefore ancillary to bankruptcy legislation.

Mr. Magone's contentions are that the Act is *intra vires* the Provincial Legislature as coming within and based upon clauses 5, 13 and 14 of s. 92 of The British North America Act; that it relates to property and civil rights and the management and sale of public lands; that it relates to the administration of justice in the Province of Ontario; that it does not encroach upon and is not in conflict with bankruptcy and insolvency legislation; that it deals with procedure only, and that in any event it only postpones for a certain time any actions to realize on the security.

Mr. Tilley argued that the 1941 Act is *ultra vires* the Province in that it infringes upon and is in conflict with the exclusive

authority of the Dominion Parliament with respect to bankruptcy and insolvency legislation and ss. 4, 5 and 10 of The Companies' Creditors Arrangement Act, 1933, 1932-33 (Dom.), c. 36; ss. 17, 21, 65 and 66 of The Winding-up Act, and s. 24 of The Bankruptcy Act, R.S.C. 1927, c. 11.

The decisive question for determination is the constitutional validity of c. 1 of the Statutes of 1941. The immediate effect of this statute, in fact its sole aim and object, is to stay proceedings in an action by the Montreal Trust Company to realize the bond mortgage under which it is a trustee, commenced by leave of the Court, granted under s. 21 of The Winding-up Act, R.S.C. 1927, c. 213. No doubt the right of a mortgagee to realize his security is primarily within the legislative jurisdiction of the Provincial Legislature under its power over property and civil rights, but the power to regulate the rights of a secured creditor of an insolvent is within the legislative jurisdiction of the Dominion as ancillary to its power over bankruptcy and insolvency: *Royal Bank of Canada v. Larue*, [1928] A.C. 187, 8 C.B.R. 579, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, and it appears to be well settled law that under those circumstances the Provincial legislative right continues until the Dominion has occupied the field, and in so far as the Dominion has not occupied the whole field. By s. 21 of The Winding-up Act the Dominion has dealt with all causes of action against an insolvent company to which the provisions of that Act apply. The Abitibi Power & Paper Company Limited is such a company, and it cannot be argued, I think, that s. 21 does not, among all other causes of action, deal with the right of a secured creditor of that company to realize his security. The effect of s. 21 is to impose a total prohibition on such an action unless the sole condition that leave of the Court has been obtained is complied with. The effect of s. 21 then is, although expressed negatively, to permit a secured creditor to realize his security if he can obtain leave of the Court to do so. This would appear to be just as wide a recognition of the creditor's right of action as that contained in s. 74(a) of The Bills of Exchange Act, R.S.C. 1927, c. 16: "He [the holder of a bill] may sue on the bill in his own name." It was interference with this latter cause of action that was the ground for declaring The Alberta Debt Adjustment Act *ultra vires* by the Supreme Court of Canada in *Attorney-General for Alberta and Winstanley v.*

Atlas Lumber Company Limited, [1941] S.C.R. 87, [1941] 1 D.L.R. 625. In that case the Provincial legislation declared to be *ultra vires* took away a cause of action actually given in the proper exercise of its powers by Dominion legislation. In the case at bar the Province has by its legislation taken away a cause of action, the giving of which is wholly within Provincial power; but the Provincial legislation is not less impeachable in this case upon that ground because the right to take away that cause of action is vested in the Dominion unless the Dominion has not seen fit to deal with it, or in so far as it has not completely dealt with it. In other words, the Ontario statute is not challenged because it takes away the cause of action over which it has no power at all, for under ordinary circumstances it could properly deal with the cause of action in this case. But the Ontario statute is challenged on the ground that it prohibits the enforcement of a right which under circumstances of the insolvent debtor it could only do if the Dominion legislation dealing with insolvency had not dealt with that right or had only partially dealt with it. The right of a secured creditor to realize his security against the estate of an insolvent is dealt with by s. 24(2) of The Bankruptcy Act and s. 21 of The Winding-up Act. These two sections are not in the same terms, and therefore the question of the application of s. 24(2) of The Bankruptcy Act might require further consideration. It would appear, however, that as s. 21 of The Winding-up Act in fact deals with the whole subject matter of the 1941 Ontario statute it is unnecessary to look any further. S. 21 in effect prohibits all actions against an insolvent company that has been brought within the provisions of The Winding-up Act except upon a sole condition. The Provincial statute prohibits this particular action without any condition whatever. The effect, therefore, of the Ontario statute is to delete from s. 21, the condition which the Dominion has laid down as the exception from its prohibition. The conflict becomes obvious, and the Dominion legislation, being legislation within the power of the Dominion, must prevail.

Putting the point upon an even narrower basis, the Dominion has ample jurisdiction to regulate actions by a creditor against an insolvent: *Royal Bank of Canada v. Larue*, *supra*.

S. 21 confers upon the Court the jurisdiction to grant leave to bring such action. The 1941 Ontario statute purports to

deprive the Court of its jurisdiction entirely in this particular case, and by s. 2, to give a jurisdiction in other cases to the Attorney-General. This, in my opinion, it clearly cannot do. *Attorney-General for Alberta and Winstanley v. Atlas Lumber Company Limited, supra.*

If further and more cogent reasons were necessary, it could be pointed out that the action at which the 1941 Ontario statute is aimed, is an action which was actually begun by leave of the Court obtained under s. 21 of The Winding-up Act. It might also be pointed out that in the later *Reference re Debt Adjustment Act, 1937 (Alta.)*, [1942] S.C.R. 31, [1942] 1 D.L.R. 1, the statute under consideration in the *Atlas Lumber Company* case was held wholly *ultra vires* by reason of its conflict with Dominion legislation recognizing various causes of action. The whole aim and object of the 1941 Ontario statute is, not to interfere with any possible cause of action, but to prohibit a particular action already commenced under a valid power conferred by Dominion legislation. It would appear therefore that the Ontario statute is even less supportable than the Alberta statute, which was declared *ultra vires* upon much more general grounds.

Under the cases on the Alberta statute, the conflict of jurisdiction arose over causes of action conferred or recognized by the Dominion. In the case at bar, the cause of action is one that is not generally within Dominion legislative competence. But that is of no moment here as the Dominion legislation arose by virtue of the Dominion's power to deal with all causes of action in the peculiar circumstances of bankruptcy and insolvency. The Dominion could deprive creditors, unsecured or otherwise, of all rights of action against an insolvent. Not only has it not seen fit to do so, it has reaffirmed those causes of action by providing that they may be litigated by leave of the Court. Leave of the Court is imposed as the sole condition, and the Province cannot, in my opinion, widen or narrow that condition or add further conditions thereto or superimpose a prohibition thereupon. In this particular case the Province has in fact gone even further than that and has attempted to superimpose upon the condition in the Dominion legislation, with which the litigant has complied, a prohibition of that particular action and a substituted condition in respect of all other actions. My difficulty throughout has been to discover by what power—where the Dominion has expressly given the right to proceed

under s. 21—the Province can interfere and take from the Courts the right to proceed.

For the foregoing reasons and after giving consideration to the real character of the Act, my conclusion is, that the Act is not based on, nor does it deal with, property and civil rights, but that it enters the field of bankruptcy and insolvency legislation, and not only interferes with the Dominion company in the course of its winding-up proceedings, but gives to the Attorney-General of the Province, in the exercise of his discretion, the absolute right to stay the present action for the enforcement of the security, or to proceed with a new action, and that it is *ultra vires* the Province and absolutely void.

HENDERSON J.A.:—An appeal from the order of Middleton J.A., dated December 4th, 1941, by which it is directed that the mortgaged premises described in an indenture of trust and mortgage dated June 1st, 1928, made to the plaintiff as Canadian trustee by the defendant Abitibi Power & Paper Company Limited, securing the first mortgage gold bonds of that company, be sold on Wednesday, the 18th day of February, 1942, under the direction of the Master of the Supreme Court of Ontario by public auction, subject to a reserve bid, to be fixed by the Master.

The defendant Abitibi Power & Paper Company Limited is incorporated by Letters Patent of the Dominion of Canada.

The company having defaulted in payment of the instalment of interest due on the bonds on June 1st, 1932, an action was commenced by the plaintiff for enforcement of the indenture and mortgage. On September 10th, 1932, by application made in that action, Geoffrey Teignmouth Clarkson was appointed receiver and manager on behalf of the plaintiff and all holders of the first mortgage gold bonds, of all the undertaking, property and assets of the defendant company.

By order dated September 26th, 1932, the defendant company was declared to be an incorporated company within the provisions of the Dominion Winding-up Act and to be insolvent and liable to be wound up by the Court pursuant to that Act, and the defendant company was thereby ordered to be wound up, and a liquidator was duly appointed.

By order made in the winding-up proceedings on December 7th, 1932, the plaintiff was given liberty to proceed with its

action for the enforcement of the said indenture and mortgage, notwithstanding the winding-up order.

The defendants, other than Abitibi Power & Paper Company Limited, were appointed as a Bondholders' Representative Committee at a meeting of bondholders held on June 7th, 1935, and by order dated September 13th, 1935, were added as parties to the action, and it was declared that they sufficiently represented all holders of the said bonds in this action.

On November 3rd, 1937, after a trial at which the validity of the indenture and mortgage was contested by the liquidator, the Court declared that the plaintiff and the holders of the said bonds were entitled to a first charge upon the undertaking, property and assets of the defendant company and that the trusts of the said indenture and mortgage ought to be performed and carried into execution.

On June 10th, 1940, upon the application of the plaintiff, made at the request of a committee claiming to represent the holders of approximately 60 per cent. of the outstanding bonds of the defendant company, it was ordered that the undertaking, property and assets of the defendant company be sold on October 16th, 1940.

The sale so ordered was duly held but, the reserve bid not being reached, it was declared abortive and on November 25th, 1940, the plaintiff, at the request of the said committee, served notice of motion for a sale without reserve bid.

Upon the return of the said motion on November 29th, 1940, the Attorney-General of the Province of Ontario moved for an adjournment until such time as a Royal Commission appointed by the Provincial Government to inquire into the affairs of the defendant company should have made its report. The motion was thereupon adjourned *sine die* with leave to any party to bring it on upon one week's notice at any time.

On or about April 1st, 1941, the Royal Commission published its report dated March 17th, 1941. I am unable to find that any plan was propounded by this report.

On April 9th, 1941, royal assent was given to The Abitibi Power & Paper Company Limited Moratorium Act, 1941 which was to come into force by proclamation. The said Act recites, *inter alia*, that it is desirable to stay any action now pending or that may hereafter be taken under the provisions of the said

indenture and mortgage for the sale of all the property and assets of the defendant company situate in Ontario "in order that an opportunity may be given to all parties concerned to consider the Plan submitted in the Report of the said Royal Commission."

On October 9th, 1941, The Abitibi Power & Paper Company Limited Moratorium Act, 1941, not having been proclaimed, the plaintiff, at the request of the said committee, served notice of motion for a sale without reserve bid.

On the said 9th day of October, 1941, a proclamation was issued bringing The Abitibi Power & Paper Company Limited Moratorium Act, 1941, into force on the 11th day of October, 1941.

Middleton J.A. in his order of December 4th, 1941, from which this appeal is taken, in ordering a sale of the mortgaged premises (but subject to a reserve bid) adjudged that ss. 1 and 2 of The Abitibi Power & Paper Company Limited Moratorium Act, 1941 (Ont.), 5 Geo. VI, c. 1, are *ultra vires*, and that is the issue raised on this appeal.

I agree with the conclusion of Middleton J.A. that the Act in question is *ultra vires* the Legislature of the Province of Ontario, and with the reasons therefor. I wish to add, however, some comments with regard to this legislation in the light of some observations of Lord Maugham L.C., in delivering the reasons of their Lordships of the Privy Council, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433.

In that case an Act of the Province of Alberta providing for the taxation of banks operating in the Province of Alberta was attacked. It was sought to justify the Act by s. 92(2) of The British North America Act, 1867, as being within the class of subjects described as "Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes".

A discussion of the principles to be observed will be found in the reasons written by His Lordship in that case, which are important to bear in mind, and one rule which has direct application here, in my view, is to examine the effect of the legislation and also the object and purpose of the legislation. The object and purpose of the Act in question here is very frankly set out in the preamble to the Act, and is quoted in part by Middleton J.A. in the reasons for his order.

In my opinion the object and purpose of this Act is not to legislate upon the subject of property and civil rights within the Province, and this is made clear by the recitals in the Act.

By this Act, Abitibi Power & Paper Company Limited is singled out, and Montreal Trust Company, the plaintiff in the action, is forbidden to proceed with its action, notwithstanding the order of the Court made in bankruptcy proceedings, that the action may proceed.

I also refer to the language of Duff C.J.C., in delivering judgment in *Reference Re Debt Adjustment Act, 1937 (Alta.)*, [1942] S.C.R. 31, [1942] 1 D.L.R. 1. At p. 3 (D.L.R.), the Chief Justice says:

"By s. 8(1)(a) of The Debt Adjustment Act, 1937 (Alta.), c. 9, a legal right which the owner of it is entitled to enforce is converted into a conditional right, enforceable only by grace of a permit from the Board granting to the owner of it a dispensation from the incidence of the general rule.

"This authority of the Board may be considered with reference to debts arising by virtue of statutes, or legal rules, that the Legislature is powerless to repeal or vary; as well as with reference to creditors whose powers and status it is incompetent to impair, or whose undertakings, or business, the Legislature is incompetent to regulate. . . .

"The distinction between right and remedy is often a useful distinction, but an enactment which takes away the remedy by action, which the law otherwise would give to the creditor in respect of his debt, and substitutes therefor the chance of obtaining, by the arbitrary act of a public authority, permission to enforce a remedy is, I think, something more than an enactment relating to procedure. It strikes, I think, at the substance of the creditor's rights. The enactment is repugnant to the provisions of Dominion statutes relating to matters within the exclusive jurisdiction of the Dominion Parliament, provisions creating or directly giving rise to, or recognizing, obligations in the nature of debts and liquidated demands."

The Chief Justice proceeds to give some examples:

"There is a class of creditors occupying a special position which must be considered. I refer to companies incorporated by the Dominion. It is settled that in the case of companies with objects other than provincial objects, the exclusive power

to legislate in relation to incorporation is vested in Parliament, and that by the joint operation of the residuary power under s. 91 of the Confederation Act and the powers conferred upon Parliament in relation to the enumerated subject, the regulation of trade and commerce, this power extends to the status and powers of the company. True, where the business of the company is subject to provincial legislative regulation, the provincial Legislature may legislate in such a manner as to affect the business of the company by laws of general application in relation to the kind of business in which the company engages in the Province; but the provisions of this statute giving to the Board the authority to interfere with the affairs of creditors in the manner set forth in s. 8 would not appear to be a general law in this sense.

“A company, for example, incorporated by the Dominion with authority to carry on the business of lending money upon various kinds of security in the Province, may find itself in a position, under the operation of s.-ss. 1(a) and (b) of s. 8, in which it and other Dominion companies are precluded from enforcing their securities in the usual way.”

Legislation enacted by the Provincial Legislatures purporting to be passed in respect of property and civil rights in the Province must, in my view, when examined, be found to be in truth and in fact legislation affecting property and civil rights in the Province, and besides, must not be legislation aimed at a particular person or corporation, but must be general in character.

It was asserted in argument before us, that when legislating upon a subject-matter within its jurisdiction, the authority of the Legislature is supreme, and it is competent for the Legislature to declare that property admittedly belonging to A. is not his property, but that it belongs to B. This, in my opinion, is not so. In support of it the case of *Florence Mining Co., Limited v. Cobalt Lake Mining Co., Limited* (1908), 18 O.L.R. 275, affirmed 43 O.L.R. 474, 102 L.T. 375, is cited, but in that case the Courts found and declared who was the true owner of the property in dispute. There is no suggestion in that case that by legislation the property of one person is taken from him and handed to another.

In my view the Legislature is not competent to deny access to His Majesty's Courts in an individual case. This does not, of course, mean that a Moratorium Act of general application may not be validly passed, within limits.

The Attorney-General argued that the legislation should be upheld as being in defence of the Province's rights in its public lands. It appears from the report of the Royal Commission that the Abitibi Company holds or has held or requires to hold cutting rights of timber on Crown lands, and power from provincial Hydro power. The legislation does not purport to have any such purpose, nor do I think legislation of this sort can be upheld on that ground.

For these reasons the appeal should be dismissed.

The order as to costs should provide that the plaintiff may add its costs to its claim, and there should be no further order.

As the day fixed in the order appealed from for sale has passed, I suggest, in order to save further proceedings, that the order taken out upon the disposition of this appeal, if it be for sale, should fix a new date.

HOGG J.: The facts that are material to the question at issue in this appeal are fully set out in the judgment of Riddell J.A.

The Winding-up Act, R.S.C. 1927, c. 213, provides that the Court having authority to grant a winding-up order in Ontario, and the Court before which subsequent applications in the course of the winding-up proceedings shall be made, is the Supreme Court of Ontario. That Court is constituted a special tribunal of exclusive jurisdiction and becomes a Dominion Court for the purposes of the statute.

S. 136 of the Dominion Winding-up Act provides:

"All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, seizure or other proceeding of any kind whatsoever."

The remedy sought by a secured creditor to enforce his security falls within this section.

S. 21 reads:

"After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the

company, except with the leave of the court and subject to such terms as the court imposes.”

From this first step in the process of winding-up a company, in so far as any proceedings at law are concerned, the statute assumes authority to direct the course of such proceedings.

All actions against an insolvent company and all proceedings in the nature of interlocutory applications and the various matters which are dealt with in the progress of an action to its conclusion, come to an end unless leave of the Court exercising the jurisdiction conferred upon it as a Dominion Court, administering a law enacted by the Parliament of Canada, is granted to continue such actions and proceedings. It was held in *Re Raven Lake Portland Cement Co.; National Trust Co. v. Trusts and Guarantee Co.* (1911), 24 O.L.R. 286, that s. 133, R.S.C. 1906, c. 144 (now s. 136), must be read in conjunction with s. 22 (now s. 21) and that what is now s. 136 lays down the rule, while s. 21 creates an exception.

The issue presented for determination in this appeal is whether the Legislature of the Province of Ontario has the power to enact that a proceeding in a suit or action, commenced by a secured creditor to enforce a security, prior to the invocation of the provisions of the Dominion Winding-up Act, but permitted to be continued by order of the Court made under the authority of s. 21, shall be stayed and shall not be proceeded with against a company respecting which a winding-up order has been made.

The Legislature of Ontario in passing The Abitibi Power & Paper Company Limited Moratorium Act, 1941, 5 Geo. VI, c. 1, has enacted that, in so far as property in Ontario is concerned, the action commenced by the Montreal Trust Company against the Abitibi Company before the winding-up order and permitted to be continued by order of the Dominion Court made in pursuance of the provisions of s. 21 above referred to, shall not be proceeded with in so far as proceedings are concerned taken pursuant to the order of the Court of 10th June, 1940, directing the sale of the undertaking, property and assets of the Abitibi Company under the mortgage to the plaintiff in the action. The Act remains in force until 31st December, 1942.

The provision that an action against an insolvent company may be stayed or may be continued only on permission of the Court is a feature usual to laws dealing with insolvency.

The principles and rules laid down by the Courts in Canada and by the Judicial Committee of the Privy Council since Confederation, to be applied in defining the scope of the respective legislative powers of the Dominion and of the Provinces in the light of ss. 91 and 92 of the British North America Act are well known and have many times been referred to in our Courts; but I take the liberty to refer again to certain of these rules of interpretation, in so far as they may assist in a decision of the question now at issue.

In *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia* (the Fisheries Case), [1898] A.C. 700, Lord Herschell L.C., delivering the judgment of the Judicial Committee, and referring to s. 91 of the British North America Act, said:—

“In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the ‘exclusive’ legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships’ opinion incompetent.”

It is true that there is a domain or field in respect to which it is possible for Dominion and Provincial legislation to overlap, in which case neither the legislation of the Dominion Parliament nor that of a Provincial Legislature will be *ultra vires* if the field is clear, but as was said in *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*, [1907] A.C. 65, and later in *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1931] 3 W.W.R. 625, 39 C.R.C. 108, [1932] 1 D.L.R. 58, if the field is not clear and the two legislations meet, that of the Dominion must prevail.

Viscount Haldane in *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 1 W.W.R. 785, [1925] 2 D.L.R. 5, discussed the same principle in the following language:

“When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it.”

This principle is also referred to in *Royal Bank of Canada v. Larue*, [1928] A.C. 187, 8 C.B.R. 579, [1928] 1 W.W.R. 534, [1928] 1 D.L.R. 945, where a subsection of the Bankruptcy Act was under discussion.

In *L'Union St. Jacques de Montreal v. Bélisle* (1874), L.R. 6 P.C. 31, the question before the Judicial Committee was whether a Provincial Act dealing solely with the affairs of a particular society which were in an embarrassed condition, and imposing a forced commutation of existing rights upon the annuitants of the society, came within Dominion powers of legislation respecting bankruptcy and insolvency. No general law with reference to these subjects existed at the time of this appeal and the Provincial Act was held *intra vires*. Lord Selborne, who delivered the judgment of the Committee, said:

"Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the provincial legislature afterwards to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency."

In *Attorney-General of Ontario v. Attorney-General for Canada* (the Assignments and Preferences Case), [1894] A.C. 189, it was held that the provisions of the Ontario Assignments and Preferences Act, R.S.O. 1887, c. 124, relating to voluntary assignments and postponing thereto judgments and executions not completely executed by payment, were merely ancillary to bankruptcy law and as such were within the competence of the Provincial Legislature so long as they did not conflict with any existing bankruptcy legislation. Lord Herschell L.C., after commenting upon certain features respecting bankruptcy and insolvency common to all such systems, said:—

" . . . a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal

with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

In *Croft v. Dunphy*, [1933] A.C. 156, Lord Macmillan, referring to *Royal Bank of Canada v. Larue*, *supra*, said that:

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its powers to legislate in relation to 'bankruptcy and insolvency', it was considered relevant to discuss the usual contents of bankruptcy statutes."

And in *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 391, 18 C.B.R. 217, [1937] 1 W.W.R. 320, the Farmers' Creditors Arrangement Act appeal, the Judicial Committee appeared to take an even wider view of the legislative power of Parliament. Lord Thankerton said:

"Their Lordships are unable to hold that the statutory conditions of insolvency which enabled a creditor or the debtor to invoke the aid of the bankruptcy laws, or the classes to which these laws applied, were intended to be stereotyped under head 21 of s. 91 of the British North America Act so as to confine the jurisdiction of the Parliament of Canada to the legislative provisions then existing as regards these matters."

A clear picture of the legislative power of the Dominion with respect to the subjects of insolvency and bankruptcy, and the right of Parliament with reference to these subjects in interfering with subjects of legislation assigned to the Provinces by the Constitutional Act, is given in the judgment of the Privy Council in *Cushing v. Dupuy* (1880), 5 App. Cas. 409; Sir Montague E. Smith delivering the judgment of the Judicial Com-

mittee expressed the opinion of the Committee in the following language:

"It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realisation, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency."

In *Shields v. Peak* (1883), 8 S.C.R. 579, Ritchie C.J.C. was of the opinion that the right to direct the procedure in civil matters in the Provincial Courts has reference to the procedure in matters over which the Provincial Legislature has power to give them jurisdiction, and does not in any way interfere with or restrict the right or power of the Dominion Parliament to direct the mode of procedure to be adopted in cases in which the Dominion Parliament has jurisdiction, and where it has exclusive authority to deal with the subject matter as it has with the subject of bankruptcy and insolvency.

S. 22 of The Winding-up Act then in force was the subject of consideration by the Supreme Court of Canada in *Stewart v. LePage* (1916), 53 S.C.R. 337, 29 D.L.R. 607. Anglin J. places actions at law respecting a company under The Winding-up Act in the same category, in so far as the control over such actions by legislation of the Dominion Parliament is concerned, as the assets and property of the company. At page 349 that learned judge said:

"But Parliament probably thought it necessary in the interest of prudent and economical winding-up that the court charged with that duty should have control not only of the assets and property . . . of the company in liquidation, but also of all litigation."

Under our constitutional system, the Province within its exclusive legislative field, has the same power within the limits prescribed by s. 92, as the Imperial Parliament in the plenitude of its power possessed and could bestow; *Hodge v. The Queen* (1883), 9 App. Cas. 117. It may be conceived that in instances falling within the exclusive Provincial field, an action at law may be put an end to, or stayed for a definite term or otherwise

controlled, by a Provincial enactment. But I do not think that is the situation here present.

It was argued with skill by Mr. A. M. Stewart on behalf of the Province of Ontario that the action taken by the mortgagee against the Abitibi Company to enforce the mortgage security is not a matter that is affected by, or that falls within the ambit of the subject of insolvency and that the secured creditor has the same rights and remedies as if the winding-up proceedings had never been instituted. As a consequence, it is contended, the Provincial Legislature has power to enact legislation controlling the course of the action, notwithstanding that the company against which the action was taken has come within The Winding-up Act. The emphasis is placed on the character of the security and the status of the creditor and not upon the fact that the mortgagor company is unable to pay its debts and is insolvent.

It is true that a secured creditor may rely upon his security if he thinks fit to do so, but if he desires to bring action against a company after a winding-up order is granted or to continue an action already brought for such purpose, he must obtain leave in the winding-up proceedings. The secured creditor must submit to the Act in this respect.

In *Re Brampton Gas Co.* (1902), 4 O.L.R. 509, Meredith C.J.O. was of opinion that those sections of The Winding-up Act providing for proof of debts have no application to fully secured claims where the creditor is content to rely upon his security and that only, and does not seek to share in common with other creditors in the distribution of the general assets of the company, and that a secured creditor may come in and prove or rely upon his security if he thinks fit to do so. At page 518 the learned Chief Justice expressed his view in the following language:

“Indeed, apart from the necessity of obtaining leave in the winding-up to bring his action (s. 16) and subject to the provisions of s. 39, it is the right of a debenture holder or mortgagee of the company to bring his action against the company to realize his security: . . . and the leave is granted almost as a matter of course, as appears from these cases.”

The Chief Justice referred to several authorities, among which is *In re David Lloyd & Co.* (1877), 6 Ch. D. 339. The secured creditor was not outside the confines of the statute in all respects. He was bound by the Act and subject to certain of its terms, in

that it was necessary for him to obtain leave to bring action to enforce his security.

In several earlier Ontario cases the Court was of opinion that it was a matter of convenience and discretion whether an action should be directed or summary proceedings directed: *Re Essex Land and Timber Company* (1891), 21 O.R. 367; *Titterington v. Distributors Co.* (1906), 8 O.W.R. 328.

Again, following the judgment in the *Brampton Gas Company* case, the subject was discussed by the Court of Appeal for Ontario in *Re Canadian Western Steel Corporation Limited* (1922), 51 O.L.R. 615, 2 C.B.R. 494, 69 D.L.R. 689. Meredith C.J.O., referring to the rights of a mortgagee, at p. 621, said:

"The rights of a mortgagee under the Bankruptcy Act differ from those which he has under the Winding-up Act. Under the former he may proceed regardless of the bankruptcy, while under the latter Act he cannot proceed unless by leave of the Court, and one of the questions to be determined is, which of these Acts governs."

The right of a mortgagee to realize his security, and the proceedings to give effect to this right when the provisions of s. 136 or of s. 21 are invoked, are wholly within the statute and part of insolvency legislation, that is to say, whether the Court directs the security to be enforced by summary petition or by action. Parliament could have withheld the alternative to s. 136 provided by s. 21, and I do not think it can be maintained that Parliament could not, still legislating within the field of insolvency, have provided for the manner in which the action should subsequently be carried on. In this connection s. 21 states that leave to proceed with the action shall be subject to such terms as the Court imposes. The right of the Court to deny leave to a secured creditor to proceed with his action against the insolvent company is given by the Act, and I am unable to conclude that, because leave to proceed with the action should apparently almost always be given as a matter of judicial discretion, that once such discretion is exercised by allowing the action to proceed, this fact can be said to place the action in its subsequent progress outside of the domain of insolvency legislation. I think it reasonable to conclude that the action is permitted to proceed because the right of the mortgagee to enforce his security against an insolvent company may be more

efficiently decided in an action than by summary petition. If Parliament has the right to enact, as it has done in s. 21 of the Winding-up Act, that a secured creditor cannot proceed with an action such as is now under consideration, without leave, then it must follow that Parliament could, by suitable amendment to The Winding-up Act, take charge of every subsequent step in the action, and could, if it saw fit, provide for the stay of the action upon certain circumstances arising. Parliament would doubtless have the power to legislate in this respect as a further incident of insolvency. Parliament could also have given a secured creditor the wider rights which such creditor has under The Bankruptcy Act, and the fact that the action of a secured creditor has not been dealt with as it has been in bankruptcy proceedings tends to the conclusion that an action, after leave to proceed is granted, is not to be considered outside of the winding-up proceedings. Furthermore the action in question came within the jurisdiction of a Dominion Court in the course of the winding-up proceedings and the order permitting the action to continue was an order of a Dominion Court. The Moratorium Act purports to override and set aside the order of such Court.

The only conclusion to be arrived at in my opinion is that the action, after leave to proceed was granted, was not taken out of the field of insolvency legislation, and I am unable to agree with the position taken by the Province that the mortgagee is outside of, and not affected by, the winding-up proceedings.

The domain or field of legislation in so far as the subject of insolvency is concerned, has been occupied by the Dominion, and because that field is so occupied it is within the exclusive legislative power of the Dominion—when its legislation has as its subject-matter one of the attributes, or a usual content, of insolvency legislation, namely, the determination whether or not, after a winding-up order has been made against a company, an action commenced before the making of such order shall be continued or not as part of the machinery or method of dealing with the claims of creditors against an insolvent company, whether secured or otherwise—to enact that the action to enforce such claims shall be stayed or shall be proceeded with. This power of the Dominion is now paramount because a general insolvency Act respecting companies has been enacted

by the Dominion, and it is not now within the legislative power of a Province to interfere with this right.

In *Reference Re Debt Adjustment Act, 1937 (Alta.)*, [1942] S.C.R. 31, [1942] 1 D.L.R. 1, Duff C.J.C. said that the statute was conceived as a means of protecting embarrassed debtors residing in Alberta, but that the Legislature in seeking to attain this object seemed to have entered upon the field reserved to the Dominion under bankruptcy and insolvency. The Moratorium Act, as is set out in a recital to the Act, was enacted as a means of enabling the interested parties to consider the plan submitted in the report of the Royal Commission, but the Ontario Legislature in the manner in which it sought to attain this object seems to have entered a field not open to it.

My opinion is that the control of an action and the staying or the ending of its progress at any time up to the final conclusion of the action, and all proceedings relating thereto, when such action is against a company which has become insolvent and has been taken within the provisions of the Dominion Winding-up Act, is removed from the jurisdiction of Provincial legislation. Only Parliament, if it should consider such further control of the action necessary, in the winding-up of an insolvent company, could enact such legislation, it being in respect to a matter which is within the subject of one of the exclusive powers of legislation given to the Dominion Parliament by s. 91 of the British North America Act, and in a field of legislation occupied by the Dominion.

The Legislature of the Province of Ontario, in enacting the Moratorium Act in question, has attempted to invade a domain or field of legislation occupied by the Dominion and one in which, if conflict arises, as it does in this instance, between Dominion and Provincial legislation, the power of the Dominion must prevail.

The Moratorium Act is, in my opinion, *ultra vires* the Legislature of Ontario.

Mr. Slaght advanced the plea that upon equitable grounds the sale of the company's assets should be stayed. A mortgagor after default has the equitable right to redeem, and I do not think the right of the mortgagee to realize his security can be stayed or set aside for the reasons submitted by Mr. Slaght.

The appeal should be dismissed and the plaintiff should have costs against the defendant company.

GILLANDERS J.A. (dissenting):—The question for decision in this appeal is whether or not an Act respecting a certain Bond Mortgage made by the Abitibi Power & Paper Company Limited to the Montreal Trust Company, 1941 (Ont.), 5 Geo. VI, c. 1, is valid and within the competence of the Legislature, or invalid as being beyond the power of the Legislature to enact. This involves a consideration of whether or not the enactment in question is in pith and substance bankruptcy or insolvency legislation within the fair and ordinary meaning of these words.

The respondents support the judgment in appeal ordering a sale of mortgaged property on the ground mainly that ss. 1 and 2 of the Act here in question are *ultra vires* as infringing the exclusive authority of the Parliament of Canada to legislate with respect to bankruptcy and insolvency under the British North America Act, s. 91, clause 21.

The relevant facts have been stated in the reasons for the judgment appealed from, in the reasons of the learned judge granting leave to appeal, and in the opinions of my brethren, and it is unnecessary to repeat them.

To assist in determining the question involved several considerations are indicated by Lord Maugham L.C. in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, [1938] 3 W.W.R. 337, [1938] 4 D.L.R. 433.

The Courts have been careful, so far as I know, not to lay down any specific definition of the words as used in s. 91(21), or to specify with precision what they include. In *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189, the Lord Chancellor says in part: "It is not necessary, in their Lordships' opinion, nor would it be expedient to attempt to define, what is covered by the words 'bankruptcy' and 'insolvency', in s. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors"

Furthermore, Parliament has authority to deal with matters of a local or private nature in those cases where such legislation is "necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91." *Attorney-Gen-*

eral for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348.

However, Provincial legislation affecting insolvent persons and corporations may be valid as falling under the heading of "property and civil rights in the Province", even though of such a nature that it would be ancillary to bankruptcy law, if it does not conflict with any existing bankruptcy legislation. *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*, [1894] A.C. 189.

The debtor company had made a conveyance by way of mortgage of the property covered thereby; what remained in the company was the equity, if any, and the right to redeem. When the winding-up order was made the liquidator might have redeemed, if desired, or the plaintiff might have come into the winding-up and filed a claim. The plaintiff sought to make no claim to share in the rateable distribution of the debtor's assets. It did not seek to avail itself of the provisions of The Winding-up Act to share, along with other creditors, in the equitable distribution of the insolvent's assets. It did seek to proceed with the action then pending to realize on the security which it held. On application for leave to proceed, an order was made giving liberty to proceed notwithstanding the winding-up order.

For the respondents it is urged that, the Abitibi Company being insolvent and a winding-up order having been made, the plaintiff's action is within the ambit of insolvency legislation, that the Court is the forum vested by The Winding-up Act with jurisdiction to permit the action to proceed or otherwise, and that the legislation in question is in conflict with this provision and therefore invalid.

Further, it is argued that the field at which the legislation is directed is already occupied by certain legislation enacted by the Dominion Parliament, and that this Act is in conflict therewith. Our attention is directed to the provisions of The Companies' Creditors Arrangement Act, 1933, 1932-33 (Dom.), c. 36, relating to effecting a compromise of creditors and the power to restrain proceedings; to the provisions of s. 24 of The Bankruptcy Act, R.S.C. 1927, c. 11, and to certain provisions of The Winding-up Act itself, particularly ss. 17, 21, 65 and 66.

Prima facie, the Act in question, purporting to stay proceedings under the order for sale now in appeal, and further

proceedings to that end, for a limited time, is not, I think, legislation relating to or falling within the field of bankruptcy and insolvency. It does not purport to interfere with the rateable distribution of the debtor company's property amongst its creditors, or to substitute any provisions which conflict with the scheme or plan of a Dominion Act respecting bankruptcy or insolvency. It is confined to dealing with the pending action and other actions to realize this mortgage security. Nor do I think the application made by the plaintiff to continue the action and not for any remedy by summary petition, under s. 136, thereby brought the plaintiff and this action within the insolvency proceedings. I appreciate that expressions in various cases lend weight to conflicting views as to whether or not the plaintiff's proceedings were part of the winding-up. The following might indicate that the plaintiff was outside such proceedings: *In re David Lloyd & Co.* (1877), 6 Ch. D. 339; *Capital Trust Company v. Yellowhead Pass Coal & Coke Co.* (1916), 9 Alta. L.R. 463, 27 D.L.R. 25 at 30, 9 W.W.R. 1275, 33 W.L.R. 873; *Stewart v. LePage* (1916), 53 S.C.R. 337; *Re Brampton Gas Co.* (1902), 4 O.L.R. 509, although here no action had been started; *In re The Cushing Sulphite Fibre Co. Limited* (1906), 38 N.B.R. 581. The decision of the Court of Appeal in England in the recent case of *Pritchard-Jones v. Le Vaye*, [1941] 3 All E.R. 455, seems to proceed on the assumption that bankruptcy legislation has for its primary object the equitable distribution of a debtor's property among his creditors. It held that the Courts (Emergency Powers) Act, 1939 (Imp.), c. 67, which was there under consideration, was not such legislation because its primary object was to protect or assist the debtor.

Lending support to an opposite view there are such cases as *Ex parte Cochrane*; *In re Mead* (1875), 20 L.R. Eq. 282; *In re Henry Pound, Son & Hutchins, Ltd.* (1889), 1 Meg. 279, 42 Ch. D. 402.

It may even be that other arguments could be advanced had the legislation in question been passed prior to the order giving liberty to proceed, notwithstanding the winding-up order. The Act in question when passed did not affect property then available in any way to the creditors of the debtor company, or within the control of the liquidator. Where property is left to go where it will according to ordinary contractual or property rights, can it be said that a Province cannot legislate concerning that prop-

erty, and the contractual or property rights affecting it, merely because under Dominion legislation the property might have been affected? I think not.

As to conflict between the legislation under consideration and existing bankruptcy legislation, it does not *prima facie* conflict with provisions relating to the effecting of a compromise. It provides no plan of compromise, nor does it touch the creditors of the debtor company as a whole. As to whether the stay of the plaintiff's action is in conflict with the provisions for staying of proceedings under The Winding-up Act, or other bankruptcy legislation: under s. 24 of The Bankruptcy Act no leave is necessary for a creditor to institute foreclosure, although the case is different when a personal judgment is sought, as distinct from the remedy *in rem*. The provisions of The Winding-up Act staying proceedings and requiring leave to proceed have been applied within the limits of the purpose of winding-up to preserve the assets, and work out their distribution among the parties entitled. Where a mortgagee has started an action and winding-up intervenes, leave will usually be granted as a matter of course. *Re Brampton Gas Company, supra*, at 518.

I am impressed with the view expressed by James L.J. in *In re David Lloyd & Co., supra*, referred to in a number of cases:

"These sections in the Companies Act, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. . . . Power was given to the Court to interfere with actions by restraining them or not allowing them to proceed, but

this power was given because it was understood that the Court would exercise it with a due regard to the rights of third persons, persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore *quasi* parties to the winding-up proceedings."

It was not argued that if the legislation in question did not fall within the field of bankruptcy and insolvency, it fell under any other specific power reserved to Parliament under s. 91. If not, it would appear to have to do with or be within at least two of the powers vested in the Legislature under s. 92: clause 5, "The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon," and clause 13, "Property and civil rights in the Province."

There was much able argument directed to the point as to whether legislation of this nature, in effect a moratorium, is procedural only, or affects substantive rights. Authorities were cited in support of both views.

If in any event it is not within the field of bankruptcy and insolvency this is probably not important. The question is discussed in *Reference re Debt Adjustment Act, 1937 (Alta.)*, [1942] S.C.R. 31, [1942] 1 D.L.R. 1, and in *Attorney-General for Alberta and Winstanley v. Atlas Lumber Company Limited*, [1941] S.C.R. 87, [1941] 1 D.L.R. 625.

The legislation under consideration in those cases was very different in pith and substance from that now being considered, and was held in direct conflict with specific powers vested in Parliament. Further, it was not limited to a moratorium. However, I think that the reasons discussed by the Chief Justice in the *Debt Adjustment Act* case may be applied, and that the Act here under consideration does affect substantive rights and is more than mere procedure.

In looking for the object or purpose of the Act, the operative part itself indicates, I think, that its pith and substance is dealing with property and civil rights in the Province. A consideration of the recitals might throw some doubt on the purpose. On the one hand, the preamble recites, *inter alia*, briefly the history of the mortgage and the legal proceedings that have taken place; a reference to the agreement between the Provincial Government and the plaintiffs respecting pulpwood-cutting agreements; the

setting up of a Royal Commission to inquire into the affairs of the company "with a view to recommending an equitable plan for solving the financial difficulties of the Company so that the Company may be in a position to meet conditions, regulations and restrictions which the Lieutenant-Governor in Council may consider necessary upon the grant or renewal of the hereinbefore recited leases, licenses, water power rights, flooding rights, licenses of occupation and other rights, powers or privileges; and generally to make such recommendations in the premises as appear to be in the best interests of all parties concerned, including the Province of Ontario; . . . that the said Company is dependent for its supply of pulpwood upon the Crown lands of the Province of Ontario; that it also requires large quantities of power in respect of which it is dependent upon leases from the Province of Ontario; that the assistance of the Government must be a largely contributing factor in the success of the enterprise."

On the other hand, the recitals contain certain portions which might indicate that the object of the Act was, in part at least, looking to some disposition of the affairs and assets of the insolvent company, other than that provided by existing legislation. Such recitals are the following: "the said Royal Commission has reported to the Honourable the Lieutenant-Governor in Council *inter alia* that existing legislation relevant to the reorganization of companies is inadequate to meet the situations that arise when companies are in financial difficulties;

" . . . and that the Government would be justified in trying to secure the carrying out of the purposes which led to the making of the various agreements and to protect the legitimate interests of persons who have contributed to or are bound up with the conduct of the enterprise;

"that whatever the potential value of the undertaking and assets of the said Company may be, no price could be obtained for the undertaking and assets, under present conditions, which would begin to approach the amount of the outstanding bonds with interest thereon;

"that if the present rate of earnings maintains for some time to come, the shareholders may well have a substantial equity in the property."

It was pointed out that this is the largest undertaking of its kind in the Province; that the company holds more leases,

licences and rights of a similar kind than any other company in Ontario; that its affairs are therefore the intimate concern of the Government, and that the legislation is, as indicated by the recitals, concerned with and directed to the management of public lands and rights within the Province and is not legislation respecting a compromise or distribution of the company's assets among its creditors, but is mainly directed to the rights of the Province, which is the owner of the property rights and licenses on which the continued operation of the company is so largely dependent.

It may possibly be that the creditors of the Abitibi Company will gain some benefit from the delay imposed by the Act, but if it is not legislation actually invading bankruptcy and insolvency, and its pith and substance is to deal with property and civil rights in the Province and the management of Crown lands and property, then, although incidentally some benefit may accrue to the creditors of the company, as a whole I think the expression of that charitable hope among the recitals does not affect the substance of the legislation.

If the legislation lies within the powers given to the Legislature by s. 92 of The British North America Act, the question whether the effect of the Act is equitable or inequitable is not open to consideration here. It has been held that within the ambit of its authority the power of the Legislature is supreme. *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited* (1909), 18 O.L.R. 275; *Hodge v. The Queen* (1883), 9 App. Cas. 132.

For the reasons indicated, I think with respect the appeal should be allowed and the order for sale set aside.

The constitutional validity of Provincial legislation being in question the Crown in the right of the Province was properly and ably represented on the appeal, but the Crown is not a party to the action and the relief should be confined to such as might be awarded between the parties; *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited*, *supra*. The defendants should have their costs of this appeal from the plaintiff, otherwise no order as to costs.

Appeal dismissed with costs, GILLANDERS J.A. dissenting.

Solicitors for the plaintiff, respondent: Johnston, Heighington & Johnston, Toronto.

Solicitors for the defendant company, appellant: Wright & McMillan, Toronto.

Solicitors for the individual defendants: Blake, Lash, Anglin & Cassels, Toronto.

Solicitors for the preference shareholders: Slaght, Ferguson & Carrick, Toronto.

Solicitors for the common shareholders: Daly, Hamilton & Thistle, Toronto.

Solicitors for the general creditors: Fraser, Beatty, Palmer & Tucker, Toronto.

[COURT OF APPEAL.]

Sandell v. Boland.

Limitation of Actions—Preventing Running of Statute—Unsigned Memorandum—The Limitations Act, R.S.O. 1937, c. 118, s. 54—Deceased Debtor—Notice under The Surrogate Courts Act, R.S.O. 1937, c. 106, s. 67(1)—Sufficiency of Notice—Particulars—Affidavit.

Where a notice of claim, filed under s. 67(1) of The Surrogate Courts Act, R.S.O. 1937, c. 106, failed to give full particulars, but these particulars were all given in an affidavit attached to and verifying the claim, so that all necessary information was available to the personal representative upon his appointment, the notice was held to be a substantial compliance with the subsection, having in mind the nature and purpose thereof, and therefore sufficient to prevent the running of the period of limitation.

There is no warrant for saying that there is a class of cases where an admission of a pending unsettled account, not amounting to either an acknowledgment of the debt or a promise to pay it, within s. 54 of The Limitations Act, R.S.O. 1937, c. 118, and not in writing, signed by the party to be charged or his agent, as required by that section, will nevertheless keep the debt alive, notwithstanding the statute, beyond the period of limitation: *Banner v. Berridge* (1881), 18 Ch. D. 254, discussed; *Langrish v. Watts*, [1903] 1 K.B. 636, referred to.

AN appeal by the defendant from a judgment of Roach J.

The action was upon a promissory note made by W. J. Boland, deceased, in favour of the plaintiff, in 1932. After the death of W. J. Boland, and before the grant of probate to the defendant as his executor, the plaintiff filed a notice under s. 67(1) of The Surrogate Courts Act, R.S.O. 1937, c. 106. The defendant, in addition to pleading that the action was barred under The Limitations Act, R.S.O. 1937, c. 118, claimed to be entitled to set off against any indebtedness on the note, the amount of three accounts for professional services rendered by the deceased in the name of Macdonell & Boland, of which he

and the present defendant were the sole members. The amount of these accounts was also pleaded as a counterclaim.

The defendant was sued, and pleaded, only as executor, but the trial judge permitted all necessary amendments to add him, both as defendant and as plaintiff by counterclaim, in his personal capacity.

The trial judge found that the notice given by the plaintiff prevented the running of the statutory limitation, and that the plaintiff was therefore entitled to judgment. He found that there was no mutuality with respect to the two indebtednesses, and that there was therefore no right of set-off. As to the counterclaim, he found that the amount of the principal account relied on was statute-barred, and therefore dismissed the counterclaim, except as to two small accounts, amounting in all to \$29.10, which were rendered less than six years before the bringing of the action.

March 4th and 5th, 1942. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and McTAGUE JJ.A.

W. N. Tilley, K.C., for the defendant (plaintiff by counterclaim), appellant: The notice filed in purported compliance with s. 67(1) of The Surrogate Courts Act, does not give full particulars of the indebtedness, in that it fails to state to whom the note was payable, or when it matured. The statutory provision must be strictly complied with, and it is not sufficient to give these particulars in the affidavit verifying the notice. The notice was therefore ineffective to prevent the running of The Limitations Act.

It is true that the executor made a payment on account of the promissory note, but this was because of a misrepresentation by the plaintiff as to the state of the accounts between him and the deceased. Both this payment, and certain letters written by the executor, were induced by this misrepresentation.

The bill of costs can be set off against the promissory note. The deceased made a claim of set-off in his lifetime, the bill of costs being in fact outstanding. This bill was considered by the deceased as owing to him personally, rather than to the partnership of Macdonell & Boland. The statement produced to the defendant by the plaintiff was an admission that the bill of costs was an indebtedness payable by the plaintiff, and an undertaking to pay, when the accounts between them were set-

tled: *Banner v. Berridge* (1881), 18 Ch. D. 254 at 274. A signed document is not necessary. The admission of a pending account is a promise that when the account is settled it will be paid: *Friend v. Young*, [1897] 2 Ch. 421 at 436; *Firth v. Slingsby* (1888), 58 L.T. 481; *In re Buskin*; *Ex parte Farlow* (1894), 15 R. 117.

J. J. Bench, K.C., for the plaintiff (defendant by counter-claim), respondent: The notice is sufficient. S. 67 is intended to provide a remedy against the restrictive provisions of The Limitations Act, and should be liberally construed. It does not require that any amount should be set out in the notice, nor does it prescribe a form; it merely provides for notice of the claim. If the notice were entirely embodied in the verifying affidavit, there would be a sufficient compliance with s. 67. Entirely apart from the affidavit, the notice gives sufficient particulars, having regard to the purpose of the legislation. Maxwell on the Interpretation of Statutes, 8th ed., p. 250; The Interpretation Act, R.S.O. 1937, c. 1, s. 10.

The plaintiff made no claim against the defendant personally, and the latter was therefore not entitled to assert a claim for fees alleged to be owing to the partnership in which he was a member. The learned trial judge should not have added the defendant in his personal capacity as a partner: Holmested's Ontario Judicature Act, 5th ed., p. 576-7; *McDougall et al. v. Cameron et al.* (1892), 21 S.C.R. 379; *Northern Timber Co. v. Bucciarelli* (1920), 19 O.W.N. 312; *Hume v. Hume* (1902), 1 O.W.R. 156; *Pender et al. v. Taddei*, [1898] 1 Q.B. 798.

The counterclaim on the bill of costs is barred by s. 48 of The Limitations Act. The last services set out in the account were rendered in 1927, and the time begins to run from that date: *Beck v. Pierce* (1889), 23 Q.B.D. 316; *Smith v. Betty*, [1903] 2 K.B. 317. The bill of costs, being statute-barred, cannot be pleaded as a set-off: *Smith v. Betty*, *supra*; *Fee v. Tisdale* (1912), 23 O.W.R. 489, 4 O.W.N. 373, 8 D.L.R. 524; *Campbell v. Imperial Bank of Canada*, 55 O.L.R. 318 at 327, [1924] 4 D.L.R. 289.

The bill of costs was rendered by the firm Macdonell & Boland, and if it was still owing, the debt was one to the partnership, and therefore not a proper subject for set-off: *Thompson v. Big Cities Realty and Agency Co.* (1910), 21 O.L.R. 394 at

402; *Re Wiarton Beet Sugar Manufacturing Co.*; *McNeill's Case* (1905), 10 O.L.R. 219 at 224; *Re Bailey Cobalt Mines Limited* (1919), 44 O.L.R. 1 at 7, 45 D.L.R. 585; *Clarkson v. Smith* (1925), 57 O.L.R. 251, 5 C.B.R. 725 (*sub nom. Re Home Bank of Canada and Winding-up Act*); *McDougall et al. v. Cameron et al.* (1892), 21 S.C.R. 379.

If the defendant was added in his personal capacity because he was interested in the bill of costs, there can be no set-off.

The memorandum handed to the defendant by the plaintiff is not an acknowledgment within s. 54 of The Limitations Act. It was not signed by the plaintiff, or by a duly authorized agent.

As to the alleged misrepresentation inducing the payment on account and the acknowledgment: No claim had been made for payment of the bill of costs, and after the services were rendered the deceased borrowed money from the plaintiff, who was therefore entitled to make the representation he did. The defendant must show that the representation was false, and that he acted on it, not knowing it to be false. There is no evidence that the acknowledgment was induced by the representation. It was made in consideration of the plaintiff forbearing to sue.

The bill of costs set out in the memorandum handed to the defendant by the plaintiff was an account with Macdonell & Boland. The defendant was a partner in that firm and must have known whether or not it had been paid. He could therefore not have been deceived by the memorandum.

Banner v. Berridge, *supra*; *Friend v. Young*, *supra*, and *Firth v. Slingsby*, *supra*, cited in connection with the argument as to a "running account", are distinguishable, in that in each of those cases there was an acknowledgment in writing within the six-year period.

W. N. Tilley, K.C., in reply: The plaintiff and the deceased were dealing with each other continually, and that accounts for the fact that the deceased borrowed money while the bill of costs was outstanding. The services performed by the deceased were not ordinary legal work, and the defendant in his personal capacity was not interested in the bill of costs. As executor, he can counterclaim for work done by the deceased: *Eyre v. Moreing*, [1884] W.N. 58. There was no lack of mutuality.

The plaintiff can derive no assistance from The Interpretation Act in interpreting s. 67 of The Surrogate Courts Act: *Morse*

v. Phinney (1894), 22 S.C.R. 563; *Archibald v. Hubley* (1890), 18 S.C.R. 116; *A. E. Osler & Co. v. Solman*, 59 O.L.R. 368, [1926] 4 D.L.R. 345, all show the necessity for strict compliance with forms.

The production of the memorandum by the plaintiff is confirmation of the fact that there were mutual obligations, which could be set off.

Cur. adv. vult.

March 27th, 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal from the judgment of Roach J., dated 12th December, 1941, after the trial of the action before him at St. Catharines.

The action was brought upon a promissory note made by the late Walter J. Boland, payable to the respondent, in the sum of \$3,500. Walter J. Boland died on 11th January, 1938, and letters probate of his will were granted to the appellant, as executor, on 31st March, 1939.

The questions principally argued were, first, whether the respondent's action was barred by The Limitations Act, R.S.O. 1937, c. 118, and second, whether the appellant is entitled to set off against the amount of the note, or to recover by way of counterclaim, the amount of a bill of costs which had been rendered at the sum of \$5,001.90. The trial judge held that the action on the note was not defeated by The Limitations Act. He held that the bill of costs was not available as a set-off, and further, that the claim in respect of it was barred by The Limitations Act.

I shall deal first with the question whether The Limitations Act affords a defence to the action on the note. The note is dated 28th April, 1932, and was payable three months after date. The writ was issued on 21st June, 1940. The only payments made on account of the note were \$200, on 28th May, 1932 (before the note matured), \$45.25 on account of interest on 2nd June, 1932, also before maturity, and \$500 paid by the executor on 30th October, 1939. The respondent relies upon this last payment as an answer to the plea of The Limitations Act. He also relies upon a letter from the executor, dated 24th March, 1938, as an acknowledgment in writing sufficient to satisfy The Limitations Act.

tions Act. Further, respondent relies upon a notice of his claim, dated 23rd April, 1938, filed by him in the office of the Registrar of the Surrogate Court under s. 67(1) of The Surrogate Courts Act, R.S.O. 1937, c. 106. I shall deal first with this notice. S. 67(1) of The Surrogate Courts Act is as follows:—

“(1) The provisions of The Limitations Act shall not affect the claim of any person against the estate of a deceased person where notice of such claim giving full particulars of the claim and verified by affidavit, is filed with the executor or administrator of such estate at any time prior to the date upon which the claim would be barred by the provisions of The Limitations Act, provided that where no executor or administrator has been appointed, such notice may be filed in the office of the registrar of the surrogate court of the county where such deceased person resided at the date of his death.”

The will of Walter J. Boland not having been proved, and the period of six years since maturity of the promissory note having come almost to an end, the respondent desired to avail himself of the provision of this section. There was attached to the notice, when filed, an affidavit of the respondent verifying the claim. Duplicates of the notice of claim and affidavit were also sent to the executor. The appellant challenges the sufficiency of the notice, and contends that it does not fulfil the requirements of the statute, more especially in that it does not give full particulars of the claim. The notice is as follows:

“IN THE SURROGATE COURT OF THE COUNTY OF YORK.

“IN THE MATTER OF the estate of Walter Joseph Boland, late of the City of Toronto, in the County of York, Solicitor, deceased.

“AND IN THE MATTER OF the claim against the said deceased by Edward T. Sandell, of the City of St. Catharines, in the County of Lincoln, Gentleman.

“AND IN THE MATTER OF The Surrogate Courts Act, being Revised Statutes of Ontario 1937, Chapter 106.

“TAKE NOTICE that the above-named Edward T. Sandell claims that there is due and owing to him by the estate of the above-named Walter Joseph Boland deceased as of the date hereof, the sum of Four Thousand Two Hundred and Eighty-

Seven Dollars and Seventy-five cents (\$4,287.75), the following of which are the particulars:

Face amount of promissory note dated the 28th day of April, 1932	\$3,500.00
Less paid on account of principal	200.00
	<hr/>
Balance of principal owing	\$3,300.00
Interest at the rate of 5% per annum, from the 28th day of April, 1932, to the 23rd day of April, 1938	987.75
	<hr/>
	\$4,287.75

"The amount of the said indebtedness is verified by affidavit hereto attached.

"This notice is filed pursuant to the provisions of The Surrogate Courts Act, Revised Statutes of Ontario 1937, Chapter 106, Section 67(1).

"DATED at the City of St. Catharines, in the County of Lincoln, this 23rd day of April, 1938.

"Witness:

"Edward T. Sandell

"J. J. Bench

"Claimant."

The notice does not say whether Walter J. Boland became liable on the note as maker or as endorser. It does not say either that the respondent is the payee, or that he became a subsequent holder. It does not say when the note matured, nor where it was made payable. Further particulars of the note are, however, to be found in the affidavit attached to the notice of claim. The affidavit says that the deceased signed the note as promisor, and that the note was payable to the order of the respondent three months after date, at the Bank of Toronto at St. Catharines, and that the note did not specify the rate of interest.

It is argued for the appellant that the affidavit cannot be read to supplement the notice of claim and to supply particulars that the statute says the notice shall give, and that strict compliance with the statute is necessary. S. 67(1) was passed only in 1937 (1 Geo. VI, c. 75, s. 2), and there do not appear to be any reported decisions upon it. No cases were cited to us upon any comparable statutory provisions, or that establish anything but general principles of interpretation, that can be of assistance in

determining the question arising here. It is of some importance to note that the primary requirement of the section is notice of the claim, and that the giving of full particulars is a secondary requirement, although one that is not to be dispensed with. It has, however, somewhat the appearance of technicality to say that the whole proceeding goes for nothing because the particulars are set forth in an affidavit attached to the notice and not in the notice of claim. S. 67(1) is collocated with ss. 65 and 66 under the heading "Contestation of Claims against Estate." S. 65 is (subject to some amendments) of long standing, and is a provision often made use of for the giving of notice by a personal representative of contestation, in whole or in part, of a claim or demand made against an estate, and for the summary adjudication upon contested claims by the Surrogate Judge. S. 66 provides for applying the provisions of s. 65, *mutatis mutandis*, to a case where the personal representative claims the ownership of personal property not exceeding \$800 in value, and his claim is disputed by another person. S. 67 is not without relation to the preceding sections. It provides a means whereby a claim may be kept alive without issuing a writ to enforce it, if notice of the claim is given to the personal representative to enable him to deal with it. Having regard to the nature and purpose of s. 67(1), what was done in this case was a substantial compliance with it, and accordingly the provisions of The Limitations Act do not affect the claim upon the promissory note.

If the respondent's claim upon the note is not preserved under s. 67(1) I have grave doubt whether his claim is kept alive either by the payment of \$500 or by the executor's acknowledgment in writing. The appellant contends that the payment was made and the acknowledgment was given in reliance upon the truth and accuracy of a memorandum of account (Ex. 13) given by the respondent to the appellant not long after the death of Walter J. Boland. This memorandum indicates that the account for \$5,001.90 set up by the appellant in this action was paid in full by sums listed in the memorandum as having been paid over a period of years from 1st June, 1927 to 30th March, 1931. The fact appears to be that none of these sums were paid on that account, and the executor appears to have been misled by the memorandum. I do not understand that the appellant charges a wilful intention to deceive on the part of the respondent, but

there seems, none the less, to be good ground for concluding that but for his belief that the \$5,001.90 account had been paid, the executor would neither have given an acknowledgment of indebtedness on the note, nor have paid the \$500 on account of it. If the respondent had to rely upon either of these as an answer to The Limitations Act, I should find considerable difficulty in upholding his position.

Having reached the opinion that by the filing of the notice of claim under s. 67(1), the provisions of The Limitations Act do not affect the respondent's claim upon the note, there remains for consideration the appellant's claim in respect of the account for \$5,001.90, of which he seeks the benefit by way of either set-off or counterclaim.

The account referred to was for services rendered in the year 1927. The account was rendered in the name of Macdonell & Boland, that being the name of the partnership firm under which the late Walter J. Boland and his brother, the executor, had carried on business as barristers and solicitors until the death of Walter J. Boland. While the account rendered has the appearance of being made up of charges for services rendered as solicitors to the respondent, it would appear from the evidence that the relationship of co-adventurers had, at the beginning of the business to which the account relates, existed between the respondent and the late Walter J. Boland, and that to a substantial extent the work itemized in the account was done by Walter J. Boland in that capacity rather than as a solicitor. Upon the respondent later deciding to treat the business matter involved as his own, Walter J. Boland seems to have regarded this account as a claim to which he was entitled for his part in the former joint adventure. In any event, in letters that Walter J. Boland wrote the respondent regarding the account, both before and at the time it was rendered, he treated the account of \$5,001.90 as one owing to himself. At this time Walter J. Boland definitely asserted his right to set this account off against what was owing on the note sued upon in this action. No letters from the respondent in connection with the matter are produced.

As the record stands on this appeal, John F. Boland, the executor, now appears as a party defendant in his personal capacity, as well as in the capacity of executor, and there is a

counterclaim in which John F. Boland, both personally and as executor, is named as plaintiff and the respondent as defendant. In my opinion all necessary parties are before the Court to overcome any technical difficulty there may have been, arising from the fact that the account stood or was rendered in the name of Macdonell & Boland. For the purposes of set-off or counterclaim in this action, the account may be treated as if it were the account of Walter J. Boland alone.

This is not, however, the chief of the appellant's difficulties. The services were rendered in 1927, and The Limitations Act is set up as an answer to the claim on the account. To avoid the statute the appellant relies upon the memorandum of account (Ex. 13) already referred to, which was delivered by the respondent to the appellant a short time after the death of Walter J. Boland. The memorandum is wholly typewritten, including the words "(Signed) Walter Boland" at the foot. It is as follows:

"Memorandum—McDonall-Boland.		
Account with Taylor & Bate Brewery		
Itemized Statement	\$5,001.90	\$5,001.90
Itemized payments from Taylor & Bate		
Brewery:		
June 1, 1927	\$1,000.00	
November 4, 1927	200.00	
October 8, 1928	1,000.00	
January 7, 1929	500.00	
April 1, 1929	500.00	
July 19, 1929	500.00	
August 24, 1929	500.00	
January 31, 1930	100.00	
November 21, 1930	505.50	
March 31, 1931	100.00	
March 30, 1931	300.00	
	\$5,205.50	5,205.50
Balance to the credit of Taylor & Bate Brewery.....		
	\$	203.60
Memorandum re—Walter Boland.		

Personal Loan covered by note dated April 28, 1932, 3 months, \$3,500.00.

(Signed) Walter Boland."

This memorandum is not signed by the respondent, even if its contents can be taken to be sufficient to prevent the operation of The Limitations Act, and s. 54 of The Limitations Act, which requires that to take a case out of the operation of the statute an acknowledgment or promise by words only must be made or contained by or in some writing signed by the party chargeable thereby or by his agent, would seem to prevent the appellant from avoiding the operation of The Limitations Act and succeeding in respect of the account.

Counsel for the appellant argued, however, that there is a class of case, of which this is one, where the provisions of s. 54 of The Limitations Act do not apply. As I understand his argument it is that, while s. 54 requires some writing signed by the party to be charged or by his agent in the case of an acknowledgment of a debt or a promise to pay, either conditional or unconditional, yet where there is an admission of a pending unsettled account between the parties that is neither an acknowledgment nor a promise to pay coming within s. 54 of the statute, it is as effective as either of them to take the claim out of the operation of the statute. *Banner v. Berridge* (1881), 18 Ch. D. 254, was cited as an illustration of the principle and other cases were referred to.

I am unable to accept the contention that counsel for the appellant ably presented in this regard. In *Banner v. Berridge* more than one letter was relied upon to defeat the operation of the statute, and one of them is referred to in the judgment at p. 275 as a sufficient acknowledgment, and at p. 277 another is said to contain both a clear admission of a pending account which must be settled and a clear promise that whatever is found due upon the taking of the account will be paid. Many cases are discussed in the judgment in the case of *Banner v. Berridge*, and I can find nothing in them to support the view that there is that class of case suggested by the appellant's counsel to which s. 54 does not apply. I may refer to the later case of *Langrish v. Watts*, [1903] 1 K.B. 636, where also there was an admission of an account to be gone into between the parties and a promise to pay what might be found due. Here several of the earlier cases are referred to. The admission of an unsettled account was regarded simply as an "acknowledgment", and it was in writing signed by the defendant. It is not suggested in the judgment that such a writing was not essential.

Even if the signature of the party to be charged could be regarded as unnecessary, I find it difficult to read Ex. 13 as an admission by the respondent that there is a pending unsettled account. The exhibit contains really two memoranda. One relates to the account for \$5,001.90, which is shown as fully covered by payments made, with a balance against Macdonell & Boland. The other memorandum relates to the note of Walter J. Boland. The purport of each of the memoranda is that there is a debt owing to Taylor & Bate Brewery, and I know of no evidence that anyone regarded them otherwise, and more especially the appellant.

In the result the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Bench & Cavers, St. Catharines.

Solicitor for the defendant, appellant: F. H. Snyder, Toronto.

[COURT OF APPEAL.]

Rex v. Draper.

Criminal Law—Reckless Driving—The Criminal Code, R.S.C. 1927, c. 36, s. 285(6), as enacted by 1938, c. 44, s. 16—Whether Mens Rea an Element of Offence—Failure to See Curve ahead—Passing Vehicle Travelling in Same Direction—Collision with Oncoming Vehicle.

Motor Vehicles—Criminal Liability—Reckless Driving.

S. 285(6) of The Criminal Code, as enacted in 1938, applies only to the driving of motor vehicles, and its purpose is to secure the safety of the public highways. On a charge under the subsection, therefore, evidence of the character and standing of the accused, and of the fact that he has for many years driven safely, is not of great importance. Where a driver turns out to his left side of the road to pass another vehicle travelling in the same direction, and collides with a car travelling in the opposite direction, in its proper place on the highway, and which he should have seen, he is properly convicted of an offence under the subsection.

AN appeal from a conviction made by His Honour Judge O'Connor, in the County Court Judges' Criminal Court, for an offence under s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1938, c. 44, s. 16.

March 30th, 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and GILLANDERS JJ.A.

T. N. Phelan, K.C., for the accused, appellant: The trial judge misdirected himself as to the essential ingredients of the offence here charged, and in particular in holding that an error of judgment or mere inadvertence is sufficient to justify a conviction under the subsection. He has found the accused guilty of such a want of care as would justify a conviction for careless driving under s. 27(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, as re-enacted by 1939, c. 20, s. 6, and has failed to distinguish between the want of care required to justify a conviction under this section and that required under s. 285(6) of the Code, and, again, that which is sufficient to create liability in a civil action for negligence.

It should be noted that s. 285(6) of the Code is in the same words as s. 11 of The Road Traffic Act, 1930, 20 & 21 Geo. V (Imp.), c. 43, while s. 27(1) of The Highway Traffic Act is similar to s. 12 of the Imperial statute.

A necessary ingredient of an offence under s. 285(6) must be the accused's state of mind. There must be some conscious indifference to the safety of others: *Rex v. Parker*, [1939] O.R. 531, 72 C.C.C. 216, [1939] 4 D.L.R. 246. There can be no conviction for a mere error of judgment. In England the Courts have said that *mens rea* is an essential element of an offence under s. 11 of The Road Traffic Act: *Rex v. Howell* (1938), 27 Cr. App. R. 5, 160 L.T. 16, 103 J.P. 9; *Rex v. Bland* (1940), Journal of Criminal Law, vol. 4, p. 42. In *Rex v. Leach*, [1937] 1 All E.R. 319, Lord Hewart C.J. approved as adequate and correct the following summing-up by the trial judge: "It must be a degree of negligence which far transcends the negligence which may make a person answerable in damages in the civil courts."

The reasoning applied to s. 284 in *Rex v. Greisman*, 59 O.L.R. 156, 46 C.C.C. 172, [1926] 4 D.L.R. 738, is equally applicable to s. 285(6).

Every word of the judgment appealed from is consistent with an offence under s. 27(1) of The Highway Traffic Act. A breach of a Provincial statute is not an offence under the Code unless there is an element of criminality: *Rex v. Costello*, [1932] O.R. 213, 58 C.C.C. 3, [1932] 2 D.L.R. 410; *Rex v. Baker*, [1929] S.C.R. 354, 63 O.L.R. 641, 51 C.C.C. 352, [1929] 2 D.L.R. 282; *Rex v. D'Angelo*, 60 O.L.R. 512, 48 C.C.C. 127, [1927] 4 D.L.R. 593.

It is a general rule of law that in all the graver cases of crime, a particular intent or state of mind is a necessary ingredient of the offence: 9 Halsbury, 2nd ed., p. 15; *Rex v. Cohen* (1858), 8 Cox C.C. 41; *Chisholm v. Douulton* (1889), 22 Q.B.D. 736 at 739; *Strutt v. Clift*, [1911] 1 K.B. 1 at 5; *Derbyshire v. Houliston*, [1897] 1 Q.B. 772 at 776; *Rex v. Gordon*, 54 O.L.R. 355, 42 C.C.C. 26, [1924] 2 D.L.R. 358; *Rex v. Bateman* (1925), 19 Cr. App. R. 8.

When considering s. 285(6), the very lowest standard of care by which conduct should be measured is that of gross negligence, as applied in civil actions. There must be a want of care such as would raise the presumption of conscious indifference or disregard of consequences: *Nix v. Godfrey et al.*, 44 Man. R. 201, [1936] 2 W.W.R. 497, [1936] 4 D.L.R. 365 at 367; *Rex v. Wilson*, 70 C.C.C. 153, [1938] 3 D.L.R. 689; *Forder v. Great Western Railway Company*, [1905] 2 K.B. 532; *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576, discussed in 53 Law Quarterly Review, 380.

The Ontario Legislature must have considered that there was an offence of careless driving, in which *mens rea* was not a necessary element, and accordingly passed s. 27(1) of The Highway Traffic Act. That section is sufficient to deal with the lesser type of offence, while s. 285(6) of the Code should be reserved for serious offences, worthy of punishment as offences against the State. The Dominion Parliament has not expressed any intention of changing the ingredients of the offence, as laid down in *Rex v. Greisman*, *supra*. S. 285(6) is supplementary to s. 284, and is intended to provide for cases in which death or personal injury has not happened, following a traffic accident.

Parliament never intended to make a man a criminal if he became involved in an accident through a mere error of judgment: *Rex v. Barnard* (1925), 57 O.L.R. 397, 44 C.C.C. 137.

It is not necessary, in this appeal, to argue as to the different degrees of negligence, but it is clear that the degree of negligence contemplated by s. 285(6) is greater than either the negligence which is sufficient in a civil action or that under s. 27(1) of The Highway Traffic Act.

J. E. Anderson, K.C., for the Crown, respondent: The facts of this case are of the utmost importance. The accused could

have seen around the curve and seen the approaching car. The findings of the trial judge can be supported, and amply justify a conviction under s. 285(6).

It was the accused's duty to keep a proper look-out, and he failed to do so. His failure amounted, in the circumstances, to culpable negligence within the contemplation of the criminal law, and is evidence of *mens rea*: *Rex v. Baker*, [1929] S.C.R. 354, 63 O.L.R. 641, 51 C.C.C. 352, [1929] 2 D.L.R. 282, which explains *McCarthy v. The King*, 62 S.C.R. 40, [1921] 2 W.W.R. 751, 35 C.C.C. 213, 59 D.L.R. 206; *Rex v. Halmo*, [1941] O.R. 99, 76 C.C.C. 116, [1941] 3 D.L.R. 6; *Rex v. Spiers*, 49 Man. R. 132, [1941] 2 W.W.R. 116, 76 C.C.C. 208, [1941] 3 D.L.R. 128; *Rex v. Carr*, [1937] O.R. 600, 68 C.C.C. 343, [1937] 3 D.L.R. 537.

The accused did not comply with the obligation imposed by subss. 7, 10 and 15 of s. 39 of The Highway Traffic Act.

For a consideration of *mens rea* in certain kinds of crimes of inadvertence, see *Beresford v. Royal Insurance Company, Limited*, [1937] 2 K.B. 197 at 220. Sometimes the blameworthy condition of mind essential to a criminal offence is mere negligence: *Chisholm v. Douulton* (1889), 22 Q.B.D. 736 at 741; *Andrews v. Director of Public Prosecutions*, [1937] A.C. 576 at 584.

The trial judge made findings of fact which should not be disturbed by this Court: *Rex v. Bower*, [1941] O.R. 51, 75 C.C.C. 323, [1941] 2 D.L.R. 269.

T. N. Phelan, K.C., in reply.

Cur. adv. vult.

April 1st, 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal from the conviction of the appellant on 9th February 1942 by Judge O'Connor in the County Court Judges' Criminal Court of the United Counties of Northumberland and Durham, of an offence under s. 285(6) of The Criminal Code, R.S.C. 1927, c. 36, as enacted by 1938, c. 44, s. 16.

The charge was that the appellant unlawfully drove a motor vehicle on highway No. 2 in a manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and the amount of traffic which was actually at the time, or which might reasonably be expected to be, on such highway.

The appellant was driving from Montreal to Toronto in his motor car on 28th September, 1941. When in the neighbourhood of Port Hope, at about 5.30 in the afternoon, he was in collision with a motor car driven by one Miller and travelling in the opposite direction, on its proper side of the road. The appellant had turned his motor car over to the south side of the pavement to pass a motor car that was travelling in the same direction as he was, and in a matter of seconds the collision with the Miller car occurred, notwithstanding Miller's effort to avoid a collision by turning towards the ditch.

There can be little question that there was dangerous driving, and that the dangerous driving was the appellant's. What is argued for the appellant is that there was no *mens rea* established, and that with his explanation of his conduct in driving as he did, it should have been found that he was not culpable.

The appellant disobeyed that rule of the road established by The Highway Traffic Act, R.S.O. 1937, c. 288, s. 39(15), which required that he should not attempt to pass another vehicle going in the same direction, unless and until the travelled portion of the highway in front of and to the left of the vehicle to be passed was safely free from approaching traffic. He knew the rule, and undoubtedly knew, as an experienced motorist, the importance of observing it in the interest of safe driving. His explanation is that he looked before he turned to the left side of the road and did not see the motor car coming from the west. By way of further explanation he says that there was a curve in the highway a short distance ahead of him, and that he did not observe this and therefore did not see the Miller car, if it was even visible at the time.

The trial judge did not accept this explanation as relieving the appellant from the charge. The occupants of the Miller car saw the appellant's car as it was "nosing out" into their path, and their car should have been visible to him. There was a line of cars travelling west, of which the appellant's car was the last, and Miller passed the leading cars of the line on the curve. It should have been evident to a careful observer that the cars ahead were travelling on a curve, and not on a straight road. Possibly a more fundamental objection to the explanation offered is that it is not enough that a motorist should be ignorant of the road ahead and of the traffic approaching. He must not turn

to the left side of the road to pass a car ahead of him unless he knows that the road ahead and to the left is safely free from approaching traffic. If the appellant did not see the Miller car approaching and did not see that the cars travelling west ahead of him were on a curve because he did not look that way, thinking the road was straight, then he did not see the road ahead of him at all.

Counsel for the appellant properly represented to the Court that the appellant is a man of high character, a man of standing and ability, and an experienced driver, who has for many years driven safely. If this charge were one that involved a question of moral turpitude or a course of conduct, one would attach great importance to these matters, for it would be exceedingly difficult to convince the Court that the appellant could be guilty of any such misconduct. The statute (s. 285(6) of The Criminal Code) creating the offence charged is, however, one that applies to the driving of motor-vehicles and to that alone. Its purpose is to secure the safety of the public highways for travel. It was hardly possible, in my opinion, for the trial judge to reach any other conclusion than he did. The appeal should be dismissed.

Appeal dismissed.

Solicitors for the accused, appellant: Phelan, Richardson, O'Brien & Phelan, Toronto.

Solicitor for the Crown, respondent: C. L. Snyder, Deputy Attorney-General, Toronto.

[HOPE J.]

Hodgins v. Hodgins.

Divorce—Bars to Relief—Collusion—Agreement between Parties as to Bringing of Action—Husband's Promise Not to Defend.

An agreement between spouses as to the bringing of an action for divorce, a term of which is that the action will not be defended, falls within the term collusion, and will disentitle the plaintiff to relief, even if the evidence is sufficient to justify a finding of adultery, and there is no indication either of connivance or of an agreement to present false evidence in proof of the adultery. *Churchward v. Churchward and Holliday*, [1895] P. 7, 71 L.T. 782, applied.

AN action for divorce, brought by a wife. The relevant facts are fully stated in the judgment.

23rd February, 1942. The action was tried by HOPE J. without a jury at Woodstock.

H. L. Daufman, for the plaintiff.

No one for the defendant.

22nd April, 1942. HOPE J.:—This action was brought by a wife for the dissolution of her marriage with her husband, the defendant, on the ground of his adultery on divers occasions with a woman whose identity is alleged to be unknown.

At the trial, the defendant was called as a witness, and admitted the adultery, but declined to disclose the name of the woman in question. However, in support of his evidence there were produced by the proper hotel employee the registration cards showing that the defendant had registered on four pertinent days, in company with a woman or party, and had apparently spent the night, warranting, in my opinion in the circumstances of this case, a finding of the commission of adultery necessary to support a judgment for decree *nisi*.

There are, however, other circumstances to be considered in connection with this case.

The husband and wife were married at Woodstock on 1st November, 1934. One child of the marriage was born on 24th September, 1935, and is in the custody of the plaintiff. On or about 1st August, 1939, the couple parted because of disagreements. The plaintiff wife has continued to reside in Woodstock where she conducts a hair-dressing business, and the defendant, who is a barber, has more recently been a resident of the city of Guelph.

On 31st March, 1941, on the complaint of the wife, the husband was charged under The Deserted Wives' and Children's Maintenance Act, R.S.O. 1937, c. 211, before the magistrate at Woodstock, and an order was then made for the payment of maintenance to the wife for the support of the wife and the infant.

The writ herein was issued on 6th January, 1942.

The alleged adulterous offences were on the nights of October 11th-12th, November 1st-2nd, November 8th-9th, November 9th-10th, and November 22nd-23rd, 1941.

There was produced and filed as Exhibit 1 at the trial, an agreement dated 20th November, 1941, drawn by the plaintiff's solicitor and executed by the parties to the action, which, in its recital clause refers to the maintenance order made by the magistrate at Woodstock on 31st March, 1941, and in which the following recital clause appears:

"WHEREAS the parties hereto are married each to the other, but have been living separately and apart from each other since about the 1st day of August, 1939, and whereas it is the intention of the wife to bring action against the husband for divorce and the husband has agreed not to stand in the way of his wife obtaining a divorce and to pay the costs of such divorce in consideration of his wife releasing him of and from all liability for future support and maintenance, both for his wife and for Gareon Douglas Hodgins their child, and to consent to the abolishing of an order made by Magistrate Groom at Woodstock on or about the 31st day of March, 1941, under the Provisions of the Deserted Wives' and Children's Maintenance Act. It is understood and agreed that the herein contained release as to support and maintenance shall only come into effect upon the granting of a final divorce decree."

and the operative clauses of the agreement are as follows:

"NOW THIS AGREEMENT WITNESSETH that in consideration of the husband paying for the costs of the divorce action to be brought by the wife against the husband and not contesting such divorce application, the wife hereby releases the husband of and from all claims or demands that she has had, may now have or may in the future have against him for and in respect of any alimony, support or maintenance both for herself and in respect of the said child.

“AND the husband hereby agrees to facilitate in every way the granting of this divorce and agrees also that he will not contest the application by the wife for an order granting her custody of the said child.”

I was unable to secure any clear evidence or statement as to the actual time when the substance of the agreement, which was apparently drawn and dated the 20th November, was arrived at by the parties before the drawing of the agreement, but the proximity of the date of the agreement with the dates of the alleged acts of adultery suggests a certain significance.

In a judgment delivered by me recently in the case of *Howson v. Howson*, [1942] O.W.N. 201, I had occasion to refer to the matter of collusion and made particular reference to the case of *Churchward v. Churchward and Holliday*, 71 L.T. 782, [1895] P. 7.

The judgment in this last named case was delivered by Sir F. H. Jeune P., and it is apparent from the evidence adduced at the trial, that the Court there came to the following conclusions:

(1) That the respondent and co-respondent were guilty of adultery.

(2) That the petitioner did not connive at such adultery.

(3) That there was no collusion to present to the Court false facts in proof of adultery.

(4) That the petition was presented in accordance with, and in consequence of, an agreement come to between the parties.

(5) That it was in fact part of the agreement that the respondent wife and the co-respondent should not defend the suit.

(6) That it was not shown that there were any specific facts material to the defence or recrimination which might have been brought forward by the wife.

In the light of these findings, it would appear that the *Churchward* case is very similar indeed to the case at bar.

In the case at bar there was sufficient evidence to warrant a finding of the commission of adultery. There is no evidence which would support more than a suspicion that the plaintiff herein had connived at such adultery. There is no evidence which supports a finding of collusion to present to the Court false facts in proof of the adultery, but it is almost an irresistible conclusion that this action was brought in accordance with the agreement dated 20th November, 1941, made between the parties, and it is a fact that by the said agreement the husband

agreed that he would not defend the action brought by his wife, but would facilitate in every way the granting of the divorce. This agreement by the husband was in consideration of his being released from all claims in respect of any alimony, support or maintenance both for his wife or in respect of their child, and it is also noted that the last named agreement on the part of the wife to waive maintenance payments which the defendant is now obligated to make by reason of the magistrate's order, only becomes effective upon the granting of a final divorce decree.

In these circumstances I am therefore somewhat reluctantly obliged to conclude that in this case there has been such agreement as falls within the category of collusion, and therefore disentitles the plaintiff to succeed in her divorce action, which is hereby dismissed.

No order as to costs, which are not asked in the prayer of the statement of claim.

Action dismissed.

Solicitor for the plaintiff: Harold L. Daufman, Kitchener.

[FISHER J.A.]

Re Pickles and Johnson.

Wills—Registration of Unproved Will—Right of Person Named therein as Sole Beneficiary and Executor to Give Good Title to Purchaser—The Registry Act, R.S.O. 1937, c. 170, ss. 1(d), 56, 73, 74, 79.

The combined effect of ss. 56, 73, 74 and 79 of The Registry Act, R.S.O. 1937, c. 170, is that a person named as sole devisee and executor in a will registered without probate can give a good title to a purchaser, notwithstanding the possibility of a later registration of a subsequent will revoking the will first registered. *Re Hollwey and Adams*, 58 O.L.R. 507, [1926] 2 D.L.R. 960; *Re Dennis and Lindsay*, 61 O.L.R. 228, [1927] 4 D.L.R. 848, applied.

A motion under The Vendors and Purchasers Act, R.S.O. 1937, c. 168.

11th April, 1942. The motion was heard by FISHER J.A. in Weekly Court at London.

B. A. Ramsay, for the vendor.

M. J. Grant, for the purchaser.

23rd April, 1942. FISHER J.A.:—The facts in connection with this application are: Sugden Pickles died in the city of

London, Ontario, on 27th January, 1942, leaving a will in which he devised and bequeathed his entire estate to his wife and made her the sole executrix.

The will was not proved, but was registered within twelve months next after the death of the testator, pursuant to s. 79 of The Registry Act, R.S.O. 1937, c. 170. That section reads:

“A will or the probate thereof and letters of administration with the will annexed registered within twelve months next after the death of the testator shall be as valid and effectual against subsequent purchasers and mortgagees as if the same had been registered immediately after such death, and in case the devisee, or person interested in the land devised in any such will, is disabled from registering the same within such time by reason of the contesting of such will or by any other inevitable difficulty without his wilful neglect or default, then the registration of the same within twelve months next after his attainment of such will, probate or letters of administration, or the removal of such impediment, shall be a sufficient registration within the meaning of this Act.”

Shortly after the registration of the will the widow and sole devisee sold the lands to the purchasers Johnson. Their solicitor requested the vendor to obtain probate of the will, his reason being that another will might be discovered and registered within twelve months after the death of the testator, devising these lands to someone other than the widow.

Mr. Ramsay, solicitor for the vendor, declined to obtain and register probate, and now contends that a purchaser is fully protected by s. 79, *supra*.

The question to be decided here is of first importance to the members of the profession and involves the consideration of s. 79, when read in the light of ss. 73 and 74. Dealing with the effect of these sections, Middleton J.A. in *Re Dennis and Lindsay*, 61 O.L.R. 228, at pp. 229-30, [1927] 4 D.L.R. 848, said:

“The effect of these is that any will which is not registered within 12 months from the death of the testator, or within the further period permitted by sec. 77 [now s. 79] of the Registry Act . . . , is void as against any registered conveyance which may have been made and duly registered by the persons beneficially entitled claiming under the deceased. While the language of the Registry Act is perhaps not as clear as it might well be,

the obscurity arising from the fact that a will is covered by the expression 'instrument' (see the interpretation clause), its meaning has never been in doubt."

In *Re Hollwey and Adams*, 58 O.L.R. 507, [1926] 2 D.L.R. 960, the same learned judge held that a purchaser taking under a registered will is protected by the sections of The Registry Act corresponding to the present ss. 1(d), 56, 73, 74, 79.

In both of these cases the learned judge was dealing with conveyances after the expiration of the period of a year from the death of the person whose will was in question, but I think the same principles apply before the expiry of that period, once a will has been registered.

In *Re Dennis and Lindsay*, *supra*, the purchaser had required the vendor to prove the intestacy of an owner of the land whose next of kin had conveyed to the vendor's predecessor in title. Middleton J.A. held that, no will having been registered within the year, The Registry Act protected the title of those claiming under a conveyance from the next of kin in whom the land vested under what is now s. 12 of the Devolution of Estates Act, R.S.O. 1937, c. 163. It is to be noted, however, that the period of a year mentioned in s. 79 runs either from death or from the discovery of a will. The protection accorded to the purchaser in that case, therefore, flowed, not from s. 79, but from the principles of purchase without notice and priority of registration enunciated in ss. 73 and 74.

The mere fact that a will had not been registered within the year could not otherwise protect a purchaser against a will discovered later, because such a will could be registered within a year from discovery, and that period would elapse at no certain time. The gist of the decision must therefore be that no will having been registered within the year from the death, the purchaser took a good title either by virtue of priority of registration, or by virtue of his purchase without notice.

It seems to me, therefore, that once a will has been registered within the year, the same principles must apply to a purchaser who takes in good faith without notice. If another will is registered within the year the purchaser must be entitled to the same protection against other wills registered within the year, as he would be against wills not available within the year, which s. 79 permits to be registered within a year of discovery.

This protection does not arise from s. 79, otherwise there would be no protection, as the ultimate period under s. 79 never expires with certainty. But s. 73 makes an unregistered instrument void against a subsequent purchaser without actual notice, and s. 74 makes priority of registration prevail.

By virtue of these sections a purchaser who claims under a will registered within the year is entitled to take the registered will at its face value as the last will of the testator. If a subsequent will is registered and, under s. 79, its registration is entitled to date back to the date of death, then priority of registration of both the prior will and the purchaser's conveyance is entitled to prevail in the absence of actual notice of the subsequent will.

The words in s. 79 "subsequent purchasers and mortgagees" might give some difficulty if they occurred only in s. 79, as "subsequent" might mean subsequent to a period of a year fixed by s. 79, but, as has been pointed out, that period is entirely indefinite. It is only reasonable, therefore, to give those words the same meaning in s. 79 as they have in s. 73, that is, not subsequent in point of time, but subsequent in point of title.

This gives due effect to the basic principles of ss. 73 and 74, under which a purchaser without actual notice and claiming by priority of registration, is given complete protection. This protection would not be in any way extended by a grant of probate, as is pointed out by Middleton J.A. in *Re Hollwey and Adams, supra*, but it has never been suggested that a purchaser claiming under letters probate duly registered is not protected, except perhaps against creditors, if he purchases within a year of the testator's death, but this protection under the reasoning in *Re Hollwey and Adams* flows from the Registry Act, not from the grant of probate.

For these reasons an order will issue declaring that the objection taken to the vendor's title is not a valid objection.

No mention of costs was made on the argument and if costs are asked I may be spoken to.

Order accordingly.

Solicitor for the vendor: B. A. Ramsay, London.

Solicitors for the purchaser: Vining, Dyer & Grant, London.

[KELLY J.]

Stykolt v. Maynard.

Sale of Land—Objections to Title—Building Restrictions—Return of Deposit—Specific Performance—Distinction between Positions of Parties.

A contract for the sale of land provided, *inter alia*, that the title was to be examined by the purchaser at his own expense, that he was to have ten days in which to search and make objection to title, and that if no objection was made within that time he should be deemed to have accepted the title. Before searching, the purchaser's solicitors wrote a letter containing a number of requisitions, including one as to building restrictions. The trial judge was of opinion that this letter indicated clearly that it had been written without any reference to the particular title or contract, and that it was not so worded as to contain any valid objection to title. The time for objecting was twice extended at the request of the purchaser's solicitors, the second extension expiring on 18th August. On that day the solicitors wrote a letter, which was not received by the vendor's solicitors until 19th August, making a specific requisition as to building restrictions, which had been found registered against the property. No reply was made to this letter, and, since the building then on the land did not conform to these regulations, the purchaser declined to complete the sale, and demanded the return of his deposit. The vendor counterclaimed for specific performance.

Held, the action must fail, and the counterclaim must succeed. In the action, the plaintiff stood on what he claimed as his strict legal rights. On this basis, however, his action must fail on the ground that there had been no valid objection to title within the time prescribed, and under the contract he was deemed to have accepted the title. The counterclaim, however, rested upon equitable principles, and the equities of the case were all in favour of the vendor. The building restrictions, even if they were still valid and enforceable, which was doubtful, had been varied, by a judge's order, within ten days after the objection had been made, and it was quite clear that if the objection had been made within the time prescribed by the contract, the order could have been obtained before the date set for closing the deal. When the order was in fact obtained, the plaintiff had not altered his position, or done anything to make the closing of the deal difficult or embarrassing.

AN action for the return of a deposit paid in connection with a proposed sale of land. The defendant, the vendor of the property, counterclaimed for specific performance of the agreement. The facts are fully stated in the judgment.

23rd and 24th February, 1942. The action was tried by KELLY J. without a jury at Toronto.

J. Shirley Denison, K.C., for the plaintiff.

J. R. Cartwright, K.C., for the defendant.

23rd April, 1942. KELLY J.:—This is an action for the return of a deposit paid by the plaintiff with an offer to purchase certain lands and premises from the defendant. The defendant counterclaims for specific performance of the agreement.

On 22nd July, 1941, the plaintiff offered in writing to purchase from the defendant, for the price of \$18,000, lands and premises in the Village of Forest Hill known as 21 Ormsby Crescent and registered in the York County Registry Office as lot 15, plan 1860. With his offer the plaintiff paid \$500 as a deposit. The offer was duly accepted on 24th July. On 2nd September, the plaintiff agreed to purchase certain chattels from the defendant and paid the full price, \$141.60. It is agreed by counsel that, if the plaintiff is entitled to the return of his deposit, he is also entitled to the return of the price of the chattels. The plaintiff alleges in his statement of claim that he refused to complete the transaction because the defendant was unable or unwilling to remove certain valid objections to title which the plaintiff had made and had not waived. The defendant pleads that he was always willing and able to complete the contract according to its terms, and counterclaims for specific performance.

The agreement (Exhibit 1) is on an "Offer to Purchase" form, printed with blank spaces for details. The following appear to me to be the conditions of the agreement material to this action: The title is to be good. The title is to be examined by the purchaser at his own expense. The vendor is not required to produce any deeds or documents or to furnish any evidence of title not in his control. The purchaser is to have ten days in which to search and make objection to title. If he makes no objections in time he is to be deemed to have accepted the title. If the vendor is unable or unwilling to remove any valid objection which the purchaser does make in time and does not waive, the sale may be cancelled and the deposit returned. The property is to be taken by the purchaser subject to any registered building restrictions. The sale is to be completed on 2nd September. Time is to be of the essence of the agreement.

Building restrictions were registered in 1913 against lands on plan 1860. These restrictions deal with a number of matters such as the cost of any building and its distance from the street line, but in this action the plaintiff complains with regard to only one of them. This sets out the kinds of material that may be used in the outside walls of buildings erected on the lands, and is as follows:

" . . . the outside walls are to be of brick stone cement or stucco, or partly of the one or partly of the other or others,

but if stucco is used it shall not be used for more than half of the outside walls”

The evidence is that, if windows and doors are not included as part of the outside walls within the meaning of the foregoing restriction, more than 60 per cent. of the outside walls of 21 Ormsby Crescent is of stucco. If, however, windows and doors should be included, stucco is used in just half of the walls.

In my opinion, windows and doors were not intended to be counted as part of the outside walls. It is to be noticed that glass and wood are not materials out of which the outside walls may be constructed. If, therefore, the area of windows and doors is included in computing the total area of outside walls, the restriction was broken as soon as a window or door was built into the wall. On the other hand, it seems to me, the restriction may reasonably be construed as meaning that not more than half of the outside walls which are composed of the named materials may be of stucco. It would be, in my opinion, an absurd construction which would make glass and wood in windows and doors prohibited materials. I conclude, therefore, that in the construction of its outside walls 21 Ormsby Crescent does not comply with the registered building restrictions.

After the offer to purchase had been accepted both parties were represented by solicitors. The defendant had built the house about 1935, having acquired the lands two years earlier. The solicitors who represented him in the present transaction had not acted for the defendant when he purchased the lands or when he built the house. The importance of this is that these solicitors had never searched the title to the lands, and in fact knew nothing whatever about the title. The house had been built according to a set of plans prepared by an architect. These plans (Exhibit 41) are drawn to scale and show where stucco is used in the outside walls, but they were never in the possession of the defendant's solicitors. On or before 2nd August the plaintiff personally requested and obtained these plans from the defendant. I find that, not later than 3rd August, all documents or evidence of title in the control of the defendant had in fact been delivered to the plaintiff.

According to the offer to purchase as accepted, the time for making objections to title expired on 3rd August. At the request of the solicitors for the plaintiff and for their own convenience,

this period was twice extended, first, to 15th, and later to 18th August. Mr. Cartwright places great importance on the fact of these two informal extensions. It appears that no search of title was made until 15th August or later.

On 30th July, before they had made any search of title, the plaintiff's solicitors sent a letter (Exhibit 6) to the solicitors for the defendant purporting to make requisitions on title. The letter is long and, in detail, perhaps not all relevant to the issues in this action, but the nature of the purported requisitions generally may be of such importance that I set them out in full:

"Without prejudice to our client's rights, we beg to make the following requisitions on title:—

"1. REQUIRED evidence that the buildings and fences (if any) on the lands to be conveyed, stand wholly within the limits thereof, and that there are no encroachments thereon or there-over of any building, erection or eave.

"2. REQUIRED evidence that there are no encumbrances, liens or easements affecting the said lands.

"3. REQUIRED evidence that the title to the said lands is not affected by any proceedings under or by virtue of the Bankruptcy Act.

"4. REQUIRED evidence that there are no executions, rates, assessments, arrears of taxes (including income or excise tax), electric, water or other accounts chargeable against the said lands under or by virtue of Dominion or Provincial Legislation.

"5. REQUIRED statutory declaration, or declarations, showing possession has been consistent with the registered title.

"6. REQUIRED statement signed by the respective holder of each mortgage (if any) to be assumed by the purchaser showing the balance owing thereon for principal and interest respectively, and the address of each mortgagee.

"7. REQUIRED production and registration of a proper discharge of each mortgage (if any) registered against the property, if the terms do not comply with the contract of sale, or in the alternative, required production and registration of proper agreement varying or extending the terms of such mortgage in accordance with the contract of sale.

"8. REQUIRED production and registration of proper release from each building restriction or covenant running with

the land, or if the same is to be assumed, required evidence that it has been complied with, or in the alternative, required production and registration of proper agreement or Court Order varying the restriction to conform to the building erected upon the said lands.

"9. REQUIRED statement of adjustments.

"10. REQUIRED delivery of possession, or if each existing tenancy is to be assumed, required production of each written lease or tenancy agreement, duly assigned to the purchaser; and if there is no written lease, evidence of the terms and conditions of each lease and a signed authority to tenant to pay rent to the purchaser.

"11. REQUIRED delivery of such document of title as may be in the possession of the vendor, or under his control."

A reading of this letter, it seems to me, makes it very clear, not only that its author was in complete ignorance of the title, but also that the letter was written without any reference to the actual agreement between the parties. I am not able to find in it any "valid objection" to the title of the lands in question here, that the defendant was bound to remove. What the defendant was asked to do was to make a complete search of his own title for the benefit of the plaintiff, and then to cure any defects that might appear on such search. The agreement, however, is specific in making it for the plaintiff to search the title at his own expense. In my opinion, what I have said applies to requisition No. 8 as well as to the others. Although building restrictions are mentioned in this requisition, I can find no "valid objection" to title in its wording. No reply was made to this letter.

As extended, the time for making objections to title expired on 18th August. On that date, the plaintiff's solicitors did write a second letter of requisition (Exhibit 11), but it did not reach the solicitors for the defendant until the 19th, a day after the time had expired. In this case, the plaintiff seeks no equity but stands on what he considers his strict legal rights. On that basis, this letter, being out of time, could not contain a valid objection to title. On the other hand, if it were to be deemed to make a valid objection, time would clearly have ceased to be of the essence of the transaction. The requisition itself may conveniently be set out here.

“REQUIRED evidence that the building restrictions contained in instrument No. 79942 (York), Schedule ‘A’, registered in the Registry Office for the County of York, have been complied with.”

No reply was made to this second letter, although there is evidence of a telephone conversation between a member of the firm of solicitors representing the defendant and a student, the author of the letter, in the office of the plaintiff’s solicitors. This conversation took place on 19th August. I do not think anything material to the action is to be found in the conversation, and I shall not discuss it further.

On 26th August, the plaintiff’s solicitors engaged a surveyor to go to the lands and make sure that the buildings were entirely located on the lands being purchased. No instructions were given him to measure the amount of stucco in the outside walls.

On 2nd September, the day fixed for closing, the solicitors for the plaintiff arranged with the solicitors for the defendant to close the transaction at the Registry Office at 2.30 p.m. that day. It will be remembered also that on that day the plaintiff had personally bought from the defendant, and paid \$141.60 for, certain chattels used in connection with the premises. Up to this time—the appointment to close was made in the morning—the solicitors for the plaintiff were not proceeding as though they had made any valid objection to title, and were not complaining because no answers had been made to their letters of 30th July and 18th August. Indeed, their whole conduct was such as was bound to induce the solicitors for the defendant to believe that the title had been accepted as satisfactory. Certainly there would be no time to cure any defect in title that might exist at that late date.

After the appointment to close had been made, one of the solicitors for the plaintiff for some reason became uneasy, and sent the surveyor whom he had engaged on 26th August to the premises to estimate the proportion of stucco in the outside walls. Before noon he had learned that more than half of the walls was of stucco and he cancelled the appointment to close, for the first time bringing to the notice of the solicitors for the defendant the objection that in this respect the building did not comply with the registered building restrictions. It is to be observed that stucco was not mentioned in either the letter of 30th July or that of 18th August.

In a letter dated 2nd September (Exhibit 15), the plaintiff's solicitors advised the solicitors for the defendant that they considered the agreement at an end and requested the return of the deposit. This was repeated in a letter dated 5th September (Exhibit 16), which requested the return also of the money paid on 2nd September for the chattels. There were telephone conversations between the solicitors on 5th September and it was agreed that all further conversations between them should be "without prejudice". Mr. Beck, of the firm representing the defendant, had said that he would apply for an order varying the restrictions, and Mr. Sankey, of the firm representing the plaintiff, had said that his client might be interested in a new agreement if such an order were obtained soon enough. Many telephone conversations took place in the days following but these are, in my opinion, clearly inadmissible, and I do not consider them. For the same reason, two letters of 12th September (Exhibit 17) and 13th September (Exhibit 18) are also inadmissible and must be disregarded. I did in fact admit the evidence at the trial, so that, if I am wrong in the foregoing ruling, no new trial will be necessary.

On 12th September, Urquhart J., on the application of the defendant in this action, made an order (Exhibit 2) varying the building restrictions, so that since that date no objection to title on the ground of non-compliance with restrictions has been sustainable. The material used in support of the application is filed as Exhibits 3, 4 and 4a. In my opinion, whatever the purpose of filing this material, it cannot be taken to prove the truth of statements made in affidavits or other documents included in it, and, more particularly, statements as to title not emanating from the Registry Office cannot be taken to prove the title.

As I have said, counsel for the plaintiff relies on his client's strict legal rights. The action is an action at law. He puts his case simply enough: The letter of 30th July made a valid objection to title and was not answered up to the time fixed for closing. Therefore, he argues, the plaintiff is entitled to regard the agreement as at an end, and is also entitled to the return of the deposit. I have already given my reasons for holding, against the plaintiff, that no valid objection to title was in fact made in time. If I am right in this, the action, so far as it depends

on this ground, must fail. Counsel then argues that at law and by contract he is entitled to get a good title and that the title is in fact bad. But I have been referred to no authority which lays down the principle that, in an action strictly at law, an express and unambiguous term of the agreement between the parties will be overridden and nullified by any general rule of law or by the practice of conveyancers. In the present case the offer made by the plaintiff expressly states: "If no objection is made within . . . [the] time I shall be deemed to have accepted the title." This ground also fails and the action must therefore be dismissed.

The counterclaim stands in a different position. This is an equitable action. Counsel for the defendant, as I understand his argument, does not contend that the Court will decree specific performance of an agreement for sale where this means forcing a title clearly bad and irremediable upon a purchaser. There is this important difference in the positions of the parties in the action and in the counterclaim. In the action the plaintiff is not required to show that the title is bad. In certain circumstances, his contract would entitle him to reject a good title. To defend the counterclaim successfully, he must show a bad title in fact, if he relies on that, or some inequitable conduct disentitling the defendant to relief. It is necessary to consider the evidence as to title and the conduct of the parties.

The restrictions relied on by the plaintiff were first registered against certain lands included as part of plan 1860 in September, 1913. They were contained in registered instrument No. 79942 (Exhibit 5). Counsel agree that lot 15, or, 21 Ormsby Crescent, formed part of the lands covered by these restrictions. In April, 1919, by a final order of foreclosure, all these lands, except lot 8, became vested in one common owner. No evidence was offered of the title to lot 8. It may be that this lot had already been vested in the common owner. If lot 8 had not been excepted from the final order of foreclosure, that order would have marked the end of the restrictions. No evidence at all was given that the owner of lot 8 ever was in a position to enforce the restrictions. Finally, no evidence was given of the nature of the restrictions imposed in subsequent conveyances of these lots by the common owner. If, as I hold, the onus is on the plaintiff to show enforceable restrictions, the evidence falls short of satisfying that onus.

By an agreement dated 3rd April, 1923, registered 12th July, 1923 (Exhibit 31), the owners of some 33 of the lots against which the restrictions had been registered by Exhibit 5 in 1913, purported to place new restrictions against their lots. These restrictions did not limit the amount of stucco to half the outside walls, and the agreement does not mention the earlier restrictions. The importance of this is that the owners of more than half the lots covered by the earlier restrictions proceed in this later agreement as if the earlier restrictions were not binding and could be ignored.

Evidence was given by a real estate agent who has done business in the village of Forest Hill for the past twenty years and has been a resident of that village for thirty years. He testified that in the past twenty years much more stucco has come to be used in building in the district than formerly was the case. This witness, Andrew Haslett, examined all the houses fronting on Ormsby Crescent. If the restrictions bind the lands in question here, they also bind all other houses on Ormsby Crescent. According to Haslett's evidence, which was not contradicted, there are fourteen houses fronting on the street. Of these, nine have outside walls that are more than half of stucco.

It took the solicitors for the defendant just ten days to obtain an order varying the restrictions. If the specific objection had been brought to their attention on or before 18th August, it is clear that the order could have been obtained before 2nd September, the date of closing. The original period for making requisitions ended on 3rd August. If the objection had been made before that date, there can be no doubt that the order could easily have been obtained before the date of closing. The extension of the time for making requisitions was given as a favour to the plaintiff's solicitors and at their request. In my opinion, nothing could well be more inequitable than the conduct of the plaintiff's solicitors in insisting, in view of these circumstances, that the defendant should be given no time at all to cure the defect, if defect there was. In my opinion, having delayed bringing the objection to the attention of the vendor's solicitors until the very day of closing, it would have been merely reasonable conduct for the plaintiff to give the defendant time to get the restrictions varied, or at any rate to investigate the objection.

On 12th September, when the order of Urquhart J. was made, the plaintiff had not made any permanent arrangements which

would prevent his going through with the purchase of 21 Ormsby Crescent. He had not changed his position in any way that would make the closing of the transaction difficult or embarrassing.

Finally, on three previous occasions orders had been obtained from judges varying the restrictions in connection with other lots on the plan. There could have been no real doubt in any solicitor's mind, that, if the restrictions did constitute a defect in title, the defect was trivial and easily remedied. Mr. Denison argues that in some way the fact that orders had been made by three judges proved that the restrictions were in fact binding on the lands. It may be indeed that an order varying restrictions is made on the basis that there are restrictions to be varied, but I cannot agree that for any purpose material to this action the restrictions were proved when the earlier orders were made. Neither party to this action was a party to the other proceedings. The material filed on the application before Urquhart J. was designed to prove that the restrictions had been terminated when the land subject to them became vested in a common owner by a final order of foreclosure (see Exhibit 4). In any case, the plaintiff was not a party to the proceedings before Urquhart J. Whatever the proper legal theory may be, such orders are in fact made from time to time in doubtful cases as a convenient and inexpensive method of clearing a possible cloud on a title. In my opinion, as between the parties to this action, the granting of the orders varying the restrictions proves nothing.

For the foregoing reasons, I am of the opinion that the defendant must have the decree of specific performance which he seeks. The equity of the case lies all one way, favourable to the counterclaim. In my judgment the plaintiff has not discharged the onus of establishing the existence of some person capable of enforcing the restrictions, or that the restrictions ever were put into effect as part of a building scheme.

I have no evidence about the lands since 2nd September, 1941; that is, I do not know whether 21 Ormsby Crescent has been occupied or vacant, or whether it has been revenue-producing. By the sale agreement, adjustments were to be made as of 1st September. This date probably will have to be changed. I do not know whether the parties will desire a reference. Counsel

may be able to agree as to the form of the judgment. They may, of course, speak to me before it is issued.

Action dismissed with costs, counterclaim allowed with costs.

Solicitors for the plaintiff: Borden, Elliot, Sankey & Kelley, Toronto.

Solicitors for the defendant: Wray, Russell & Beck, Toronto.

[HOPE J.]

Montreal Trust Company v. The Oxford Pipe Line Company et al.

Companies—Meetings—Quorum—Proxies—The Companies Act, R.S.O. 1937, c. 251.

If the letters patent and by-laws of a company contain no special provisions as to the quorum required at shareholders' meetings, the majority of shareholders present, either personally or by proxy, at any such meeting, provided due notice has been sent to all shareholders, can validly transact business, even if only a small fraction of the total capital stock is represented. It is not necessary, at such a meeting, that a majority of the issued stock should be represented. A proxy expressed to be subject to conditions, restricting the holder's freedom of voting, is invalid under The Companies Act, R.S.O. 1937, c. 251. *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230; *Re National Grocers Company Limited*, [1938] O.R. 142, [1938] 3 D.L.R. 106, followed. As between shareholders, no question of estoppel can arise from the fact that similar proxies have been accepted at previous meetings.

A motion for an injunction, which was treated, by agreement of all parties, as a motion for final judgment. The facts fully appear in the judgment.

1st April, 1942. The motion was heard by HOPE J. in Weekly Court at Toronto.

D. L. McCarthy, K.C., and *G. M. Huycke, K.C.*, for the plaintiff.

W. N. Tilley, K.C., and *T. M. Mungovan*, for the defendants.

28th April, 1942. HOPE J.:—This motion, which was for an injunction restraining the defendants and each of them and the attorneys and agents of each of them from taking any accounts under and pursuant to resolutions alleged to have been passed at a special general meeting of shareholders of the defendant The Oxford Pipe Line Company Limited (hereafter referred to as "Oxford"), held on 20th March, 1942, until the trial of this action, became, at the request of counsel for all parties, a motion for final judgment.

The material facts which are set out in the combined affidavits filed by the parties in support of the motion are not in controversy, and I briefly review these for a more understanding approach to the two questions—and two only—which require the Court's determination.

The plaintiff is the mortgagee under a mortgage and deed of trust from the Western Ontario Natural Gas Company Limited (hereafter referred to as "Western"), to secure certain indebtedness. Part of the property so hypothecated was 13,780 shares of common stock owned by "Western" in "Oxford", a subsidiary of "Western". The present authorized capital stock of "Oxford" is 1,100 preference shares and 16,000 common shares.

According to the letters patent of the company ("Oxford"), at all annual, general or special general meetings, each common share of the company's capital stock shall entitle the holder thereof to one vote, and each preference share shall entitle the holder thereof to one vote, provided, however, that if at any time there remain unpaid in the aggregate four half-yearly dividends on the preference shares, whether declared or not, then after the due date of the fourth half-yearly dividend not so paid, and during the continuance of such arrears, each preference share shall entitle the holder thereof to one hundred votes in lieu of one vote as before set out. While I mention this, it is not apparent that it has had any bearing on the present situation.

A special general meeting of all shareholders of "Oxford" was duly called for 20th March, 1942, to consider the liquidation of the company's affairs.

The president of "Oxford" is also the president of "Western" and is, by virtue of executorship and beneficial interest, the holder of a majority of the issued and outstanding preferred stock of "Oxford".

It had been customary at earlier meetings of "Oxford" for "Western" to request from the plaintiff a proxy to certain individuals named, covering the 13,780 common shares pledged under the mortgage. "Western" did not so request such proxy for the present special general meeting on the ground, as I understand it, that the mortgage was in default, but the plaintiff, as mortgagee, sent a proxy as usual in the name of individuals, and such individuals duly attended and delivered the proxy to

the meeting. There being no form prescribed by the by-laws of the company for proxy appointments, the proxy used was in accordance with Form 5 of The Companies Act, R.S.O. 1937, c. 251, s. 52(4), but with a typed footnote thereto; "13780 common shares held" and also "(subject to the attached restrictions)", and attached to the proxy as so noted was a letter from the plaintiff company addressed to "Western", stating that the proxy "shall not be voted, exercised or used for any purpose inconsistent with the provisions or purposes" of the mortgage and deed of trust from "Western" to the plaintiff.

According to the minutes of the meeting of 20th March, a copy of which is filed, there were six shareholders present in person, representing 13 common shares and 15 preferred shares, and there were proxies filed prior to the commencement of the meeting from shareholders representing 951 preferred shares and 14,107 common shares. A statutory declaration evidencing the mailing to all shareholders of the notice calling the meeting, pursuant to the by-law in that behalf, was read, and the chairman declared a quorum to be present, and the meeting to be properly constituted.

The vital business before the meeting was the question of the voluntary liquidation of the company, and the appointment of a liquidator. In due course a vote was called on these matters, and Mr. Huycke and Mr. Mungovan were named by the chairman as scrutineers.

After examination of the ballots, Mr. Huycke reported to the chair in writing that as scrutineer he disallowed proxies for some 180 shares, and that after such disallowance there were recorded in favour of the resolution for voluntary liquidation 1,121 votes, and against the resolution 13,780 votes. On the other hand Mr. Mungovan as scrutineer reported in writing that he had disallowed 13,960 votes and as a result that there was a vote in favour of the resolution of 1,121 votes, with no votes *contra*.

The chairman thereupon examined and considered the disputed ballots and proxies in respect thereto, adopted the report of Mr. Mungovan, and declared the resolution unanimously carried. After registration of certain objections and protests by Mr. Huycke and by Mr. Milton, one of the proxies named by the plaintiff company, they withdrew from the meeting.

In due course, on 24th March, a writ was issued in which the plaintiff claimed against the defendants for a declaration that

the resolutions alleged to have been passed at the special general meeting on 20th March were invalid and of no effect, and for an injunction restraining the defendants and each of them from taking any action pursuant thereto.

With such circumstances extant, it was fully agreed by counsel for all parties that the present motion be for judgment on the facts agreed, and that in arriving at such judgment the Court's task should be reduced to the answering of the following two questions:

(1) Was the proxy filed by the plaintiff for the 13,780 shares valid or invalid in law, because of the addition thereto and of the annexed document hereinbefore referred to?

(2) If the proxy be declared invalid, did the meeting require a quorum of 51 per cent. of the issued capital stock in order that it could legally transact business?

It was only after the argument, on my approach to the first question, that I learned that this first question had comparatively recently been before this Court both on a motion in single Court and also in the Court of Appeal. I refer to *Re Langleys Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230, in which the judgment of the Court of Appeal was delivered on 24th February, 1938, and to *Re National Grocers Company Limited*, [1938] O.R. 142, [1938] 3 D.L.R. 106, in which a judgment was delivered by Roach J. on 23rd February, 1938. These two judgments are both to the same effect, and go to confirm the conclusion which I had reached on this first question at the end of counsel's argument, and my answer, therefore, on this question is that the proxy was invalid, and I adopt the reasons therefor as set out in the judgments referred to.

It was argued by counsel for the plaintiff that the same form of proxy had been used and apparently recognized by the chairman of "Oxford", at many previous meetings of the company, and that therefore there was an estoppel. To this argument effect might well and properly be given if some stranger had acted upon the assumption of the regularity of the proceedings or the vote taken, as a result of the present proxy, but the plaintiff does not stand in such a position. Amongst shareholders of the defendant the doctrine of estoppel cannot be applied to remedy a failure to comply with a statutory direction or a violation of a statutory provision.

My consideration of the second question, however, has had to break, to a certain extent, new ground, with the valuable assistance given to me by both counsel.

Mr. McCarthy argued that failing representation at the meeting of at least fifty-one per cent. of the issued capital stock entitled to vote at the meeting, there was no quorum, and that without a quorum business could not be transacted. It was admitted by all parties that there is no provision in the Ontario Companies Act, or in the letters patent or by-laws of "Oxford", prescribing or defining a quorum at an annual or special general meeting. Hence Mr. Tilley contended in effect that, failing any such statutory or other provision providing for a quorum to constitute a meeting, and granted that due notice was given to all holders of issued stock, which is admitted, then the business of the meeting could properly be conducted even with as low a number as three persons present representing as many shares.

"Quorum" is defined by Webster's International Dictionary as "Such a number of the officers or members of any body as is, when duly assembled, legally competent to transact business. The quorum of a body is an absolute majority of it, unless the authority by which the body was created fixes it at a different number."

Halsbury's Laws of England, 2nd ed., vol. 8, p. 62, para. 111, states:

"Where a corporation consists of a definite number of corporate electors, a majority of that number must be present in order to constitute a valid election. But where a corporation consists of an indefinite number of corporate electors, a majority only of those existing at the time of the election need be present", and the author cites with approval *Rex v. Bellringer* (1792), 4 T.R. 810, at p. 822. Similarly it would appear that it is a rule of common law that where a body is composed of a definite number of members and no other definite provision is made, a quorum consists of a majority of the members. *Rex v. Miller* (1795), 6 T.R. 268; *Rex v. Bellringer*, *supra*; *In re Webster Loose Leaf Filing Co.* (1917), 240 Fed. 779.

In *Howbeach Coal Company (Limited) v. Teague* (1860), 5 H. & N. 151, the matter of a quorum was discussed. In that case there was a rule that three out of five directors, when appointed,

could act, but that until the directors were appointed the subscribers should be the directors. There were seven subscribers. At the meeting discussed in this case three only of such subscribers were present. At page 157, Martin B. held, in speaking of the validity of the business transacted at the meeting of subscribers held in lieu of the directors' meeting:

"But unless the whole body were present, or at least a majority of them, they could not act as such."

In *Corpus Juris*, vol. 14, pp. 895 and 896 and the notes, particularly on p. 896, there is a large number of American and English cases cited, and they are not all in agreement by any means, but the net result of these authorities is found in the following quotation from the judgment in *Morrill v. Little Falls Manufacturing Co.* (1893), 53 Minn. 371, 55 N.W. 547:

"Where the charter and by-laws of a corporation are silent on the subject, the common-law rule is that such of the shareholders as actually assemble at a properly convened meeting, although a minority of the whole number, and representing only a minority of the stock, constitute a quorum for the transaction of business, and may express the corporate will, and the body will be bound by their acts. The contention of appellants that this rule applies only to such organizations as towns, churches, and the like, and not to stock corporations, finds no support either in reason or authority. The correct distinction is between a corporate act to be done by a select body, of a definite number, as, for example, a board of directors or trustees, and one to be performed by the constituent members of the corporation. In the latter case a majority of those who appear may act. This distinction is clearly made in several of the cases above cited, and also in the leading case of *Rex v. Bellringer*, [*supra*]. As was said by Lord Mansfield in *Rex v. Varlo* (1775), Cowp. 248: 'It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is, for the members to meet on the charter days, and the major part who are present do the act. But where there is a select body it is a different thing, for there it is a special appointment.' "

The reason for this rule is then stated as follows, quoting from the judgment in *Gilchrist v. Collopy* (1904), 119 Ky. 110, 82 S.W. 1018: "The reason for the common law rule is obvious.

If it were otherwise, the affairs of the corporation, through either the negligence or the malevolence of a majority of the shareholders, might be allowed to go to ruin. We know of no power by which the shareholders can be forced to attend the meetings of the corporation, but the law affords a sufficient remedy for this danger by placing the control of the property in the hands of those shareholders who are sufficiently interested in its affairs to attend the corporate meetings. If the rule we have announced did not prevail, a designing majority of the shareholders, who had obtained possession of the corporation by electing the directors, could retain the management indefinitely, no matter how injurious that management might be to its affairs, by simply abstaining from its corporate meetings."

It is suggested in some of the decisions quoted in *Corpus Juris* that except where the rule of voting is by shares, the rule of the common law herein cited is applicable to joint stock corporations because, although the number of shares is definite, yet the number of persons who hold those shares is constantly varying.

In a memorandum submitted after the argument by Mr. Huycke, it is urged that by virtue of s. 51 of the Ontario Companies Act, the rule of voting is by shares. I have, therefore, read the whole of the Ontario Companies Act with close scrutiny to observe the general policy with respect to this point, which is suggested by other provisions in the Act.

Prior to 1907, s. 47(*e*) of the Ontario Companies Act (then R.S.O. 1897, c. 191) was in the same terms as the corresponding section of the Dominion Act, R.S.C. 1906, c. 79, s. 80(*e*), expressly authorizing directors by by-law to fix, *inter alia*, the quorum of directors or of shareholders. This s. 47(*e*), in 1907, c. 34, became s. 87(*d*) and omitted the provision as to quorums.

A quorum with respect to the directors is now defined by s. 85(2) of the Ontario Act, and s. 91 gives to the directors power to pass by-laws to regulate, *inter alia*, the procedure in all things at meetings of the company. While there is no statutory provision defining a quorum for a meeting of shareholders, it might be noted that in s. 17(2) confirmation of the by-law there in question must be "by a vote of the shareholders present or represented by proxy, at a general meeting duly called for considering the same, and holding not less than two-thirds of the

issued capital stock represented at such meeting". Likewise s. 79 provides for confirmation "by a vote of shareholders present, or represented by proxy and holding not less than two-thirds of the issued capital stock represented at the meeting". The same provision occurs in s. 90(4) and in s. 94(5). The recurring provision in these sections, namely, that the vote is to be not less than two-thirds of the issued capital stock *represented at such meeting*, indicates clearly, in my opinion, that the whole policy and tenor of the Ontario Companies Act is in conformity with the rule of common law and that in order to constitute a meeting legally qualified to transact business, it is not necessary that at least 51 per cent. of the issued capital stock be represented personally or by proxy.

There shall therefore be a declaration on each question propounded in accordance with the foregoing reasons.

No order as to costs.

Judgment accordingly.

Solicitors for the plaintiff: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the defendants: T. M. Mungovan, Toronto.

[HOGG J.]

Splawnyk v. Power.

Taxation—Municipal Tax Sale—Regularity of Proceedings—Rights of Purchaser—Possession—Mesne Profits—Effect of Redemption—The Assessment Act, R.S.O. 1937, c. 272, s. 171.

Costs—Discretion of Court—Trivial Dispute, Not within County Court Jurisdiction.

The effect of s. 171 of The Assessment Act, R.S.O. 1937, c. 272, is that the purchaser of land at a tax sale is entitled immediately upon the issue to him of a certificate of sale, to possession of the land. *McLauchlin v. Pyper* (1870), 29 U.C.Q.B. 526; *National Trust Co. Ltd. v. Barker*, [1931] O.R. 388, [1931] 3 D.L.R. 583, applied. If this possession is withheld from the purchaser, he will be entitled to be compensated for the profits which he might have derived. If the land is redeemed within the statutory period, these profits will be calculated from the date of sale to the date of redemption.

Remarks on the question of costs where the dispute, although not within the jurisdiction of the County Court, was trivial.

AN action for rent or mesne profits of land purchased at a tax sale and subsequently redeemed. The facts are fully stated in the judgment.

20th April, 1942. The action was tried by HOGG J. without a jury at Cochrane.

Charles H. Kerr, for the plaintiff.

J. E. Lacourciere, for the defendant.

29th April, 1942. HOGG J.:—On 11th September, 1941, the surface rights of lot No. 40 on Wilson Avenue in the town of Timmins, Ontario, as shown on plan M22 (Sudbury) in the office of Land Titles at Cochrane, were sold at a tax sale by the treasurer of the corporation of the town of Timmins for arrears of taxes amounting to \$395.55.

The defendant was the assessed owner of the lands sold at the said sale, and had been such for some years prior to the tax sale. A certificate of sale dated 11th September, 1941, was given to the plaintiff, the purchaser of the said lands. The defendant, the original owner, remained in possession of the lands after the sale and continued to reside upon the property.

There is evidence that after the sale the plaintiff caused a demand to be made upon the defendant for possession or for rent. As this demand was not complied with, the plaintiff commenced the present action on the 7th February, 1942, for possession of the property and for rent or mesne profits from the date of the sale at the rate of \$30 per month.

On 11th April, 1942, the sum of \$656.49, the total amount required to redeem the property, was paid to the municipality of the town of Timmins, by one Lila Power. Such being the case, the plaintiff properly admits that he had no further right to possession of the lands from the date of redemption, and his claim under the action for possession is abandoned.

In answer to the plaintiff's claim for rent or profits from the land from the time of the sale to the time of redemption, the defendant in his statement of defence pleads that the tax sale in question was irregularly conducted, and that all proceedings taken thereunder are null and void, and that the plaintiff has no right to rent or profits from the land from the date of the tax sale to the date of redemption.

The evidence shows that in 1941 the property was assessed for a total amount of \$650. The defendant stated in evidence that the buildings upon the land are old and in disrepair and are of no value, but that an offer had been made for the land of \$2,200.

From the description given by the defendant of the house on this land, I am of the opinion that its value would be very small. There are two small shacks on the land, one of which is used by the defendant during the summer months as a soft drink stand and from which he derived a small profit.

One of the grounds advanced by the defendant in attacking the tax sale is that the property in question was not properly described in the notice of the tax sale published in the Ontario Gazette. I cannot hold with this contention. The land consists of a town lot and the description appearing in the Ontario Gazette is "139 Wilson, East part Lot 40, Plan M22, S." This clearly identifies the land.

The further objection raised by the defendant is that in the statement furnished to the defendant by the municipal treasurer of arrears of taxes for the years 1935 to 1940 inclusive, the taxes for 1937 are stated to be \$54.82 exclusive of interest, and that the tax bill rendered to the defendant for 1937 states the taxes to be \$55.18. No objection to this discrepancy, apparently, was made by the defendant, and the discrepancy is trifling. The sale would not be vitiated on this account: *Claxton v. Shibley* (1885), 10 O.R. 295.

The plaintiff contends that by virtue of The Assessment Act, R.S.O. 1937, c. 272, s. 171, he had the right to possession of the property and to the profits thereof from the date of the tax sale to the time of redemption.

In *McLaughlin v. Pyper* (1870), 29 U.C.Q.B. 526, it was held that the certificate of sale entitled the purchaser to enter upon the lands and turn out the owner in possession without being liable in trespass. See judgment of Wilson J. at p. 528, where that learned judge held that after the time for redemption if the property is not redeemed, and the giving of the deed to the purchaser, the purchaser can take possession of the land and eject the former owner by authority of the certificate, but that there is no greater right given the purchaser by the statute to do these acts under the certificate after the time for redemption than the purchaser had while the period of redemption was continuing.

In *National Trust Co. Ltd. v. Barker*, [1931] O.R. 388, [1931] 3 D.L.R. 583, it was held that the purchaser of land at a tax sale had the right to lease the land as an owner and receive

the rents, and that under s. 167 of The Assessment Act, R.S.O. 1927, c. 238, now s. 171, such use was not restricted to the mere right to occupy the land. What is meant by the word "use" in this section is that the purchaser may use the land in any way the owner may, so long as he does not interfere with the value of it, and has the right to lease the land as the owner could, to make money out of it as the owner could, and to receive the rents.

As this action now stands the sole question in issue is what amount, if any, the plaintiff is entitled to as profits which he might have derived from the land if he had obtained possession of it (to which he had a right) after the tax sale.

The assessed value of the property is small. The defendant gave evidence that the buildings on the land were of no value, and the plaintiff did not produce evidence of what this particular property or similar property in this district, or in a district in Timmins similar to that where the property in question is situated, would rent for.

My conclusion is that any profits which the plaintiff might have made from this property if he had obtained possession would be extremely limited in amount.

I think that the sum of \$75 is a fair amount at which to fix any profit which the plaintiff could have made out of this property in the period of approximately seven months between the tax sale and the date of redemption.

As to the question of costs: The defendant attacked the plaintiff's title to the lot in question and endeavoured to show that the sale to the plaintiff was void. There is evidence that the value of the property is in excess of \$500. Such being the case, the County Court would not have jurisdiction and the action was one within the jurisdiction of the Supreme Court only. However, the dispute is an extremely petty one. If the plaintiff had been given possession when it was demanded, he would have had such possession at the risk of redemption and as it turned out could only have had possession for about seven months. The profits which he could have derived from possession, were practically negligible. The claim for possession was of necessity abandoned. I think this is a case for the exercise of my discre-

tion as to costs, and I will fix the plaintiff's costs at the sum of \$50.

Judgment for \$75, with costs fixed at \$50.

Solicitor for the plaintiff: Charles H. Kerr, Timmins.

Solicitor for the defendant: J. E. Lacourciere, Timmins.

[COURT OF APPEAL.]

Trubenizing Process Corporation v. John Forsyth, Limited.

Patents of Invention—Licensing Agreement—Assignment of Licensor's Rights—Effect of Invalidation of Patent and of Filing of Disclaimer—The Patent Act, 1935 (Dom.), c. 32, s. 50.

By agreement in writing, made in May, 1935, C. Co. granted to the defendant company a licence to use certain patented processes, subject to the payment of royalties. The agreement covered two patents, A. and B., and the licensee, *inter alia*, admitted the validity of the patents and agreed not to contest their validity, or "to become voluntarily a party directly or indirectly to any procedure disputing the validity or tending to impair the value of any of said inventions or Letters Patent covering the same . . . except as to such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken." In August, 1935, an action to impeach these patents was brought against C. Co. in the Exchequer Court, and the judgment in that action, delivered in March, 1936, declared patent A. invalid, but upheld the validity of patent B. The plaintiff in that action appealed, as to patent B., and the Supreme Court of Canada declared that patent also to be invalid, on the ground that the claims, as filed, went beyond the invention, and on the ground of earlier invention. C. Co. then filed a disclaimer, narrowing the claims, and appealed to the Privy Council, which varied the judgment of the Supreme Court so as to make it a declaration of invalidity only of the claims as originally filed. The defendant discontinued the payment of royalties in 1937, shortly after the judgment of the Supreme Court. On 1st May, 1939, C. Co. granted to the plaintiff company an exclusive licence in Canada under certain named patents, including patent B., but not including patent A., and assigned to it all claims for royalties which it might have under licences theretofore granted by it. The plaintiff now sued for royalties under this agreement.

Held, the action must fail. Per Robertson C.J.O. (who also agreed with the reasons of Gillanders J.A.): Only patent A. had been declared invalid by the Courts, and notwithstanding the reservation made by clause 11 of the licensing agreement, this could not put an end to the agreement. The licensee might have a right of election, but it must exercise this right, by either words or conduct. The same result followed from the filing of the disclaimer. But the assignment from the licensor under which the plaintiff claimed was not such an assignment as entitled the plaintiff to sue in its own name, without joining the licensor, and it was doubtful whether any proper notice of the assignment was given to the defendant as licensee. Per Henderson J.A.: The whole foundation of the licensing agreement had disappeared, since patent A. had been declared invalid, and patent B., by the disclaimer, had been made into something entirely different from that with respect to which the parties had contracted. C. Co. had therefore, at the date of the assignment to the plaintiff, neither patents nor claims for royalties to assign, as against the defendant.

Per Gillanders J.A.: The defendant could not, in this action, attack the validity of the disclaimer, or of patent B. as amended thereby. But the assignment to the plaintiff referred only to patent B., whereas the claim for royalties under the agreement was based upon both patents, and was one and indivisible. Having no assignment of patent A., or of royalties payable in respect thereof, the plaintiff could not succeed in any claim for royalties in respect of it, and because of the indivisible nature of the claim under the licensing agreement, the action must fail.

Per Chevrier J. (at the trial): A disclaimer may be filed, under s. 50 of The Patent Act, 1935 (Dom.), c. 32, only if the patentee, at the time of the original application, has made his claims too broad as the *bona fide* result of mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, and the onus of establishing that these conditions are present is upon those who seek to uphold a disclaimer. (The Court of Appeal did not deal with this point).

AN appeal by the plaintiff from the judgment of Chevrier J. dismissing an action for the payment of royalties under a licensing agreement made between the defendant and the assignor of the plaintiff.

The following statement of facts is taken from the judgment of GILLANDERS J.A.:

"The plaintiff in the action claims from the defendant alleged arrears of royalties under a certain agreement made between the defendant, as licensee, and Canadian Celanese, Limited, as licensor, dated 28th May, 1935. More detailed reference will be made to this agreement later. It purported to grant to the defendant a non-exclusive, non-transferable licence to use the alleged improvements of two Canadian patents, *viz.*, Camille Dreyfus 265,960 and Camille Dreyfus 311,185, then owned by the Celanese Company, which will be referred to hereafter as 'Celanese'. The plaintiff claims that the rights to the royalties in question were assigned to it under an agreement with Celanese dated 1st May, 1939.

"These patents were both in respect of the use of cellulose and its derivatives in the manufacture of fabrics, and the licence was in respect of the use of this alleged improvement in collars, bosoms and cuffs of men's shirts.

"In August, 1935, the B.V.D. Company, Limited, brought an impeachment action in the Exchequer Court against Celanese directed at the validity of the two patents mentioned. In that Court, judgment was given on 26th March, 1936, declaring patent 311,185 invalid and void, but upholding the validity of patent 265,960. This judgment is reported *sub nom. B.V.D. Company, Limited v. Canadian Celanese, Limited*, [1936] Ex.

C.R. 139, [1936] 4 D.L.R. 159. In respect of patent 311,185, no appeal was taken from this judgment declaring it to be invalid, but an appeal was taken by the B.V.D. Company from the judgment so far as it held No. 265,960 valid, and on that appeal the Supreme Court of Canada by judgment dated 19th March, 1937, reported [1937] S.C.R. 221, [1937] 2 D.L.R. 481, held this patent to be invalid on the grounds, briefly, that the claims went beyond the invention and were anticipated by earlier patents.

"After delivery of this judgment, but before it was entered, Celanese filed a disclaimer, purporting to be in pursuance of s. 50 of The Patent Act, 1935 (Dom.), c. 32, narrowing the breadth of the claims of the patent in contest, and then made application to the Supreme Court for a re-hearing of the appeal. This being refused ([1937] S.C.R. 441, [1937] 4 D.L.R. 449), Celanese, after having obtained special leave, appealed to His Majesty in Council. On the advice of the Privy Council, His Majesty's order issued on 24th February, 1938, and is reported, *sub nom. Canadian Celanese Ltd. v. B.V.D. Co. Ltd.*, [1939] 1 All E.R. 410, [1939] 2 D.L.R. 289. This order varied the judgment of the Supreme Court, which had declared patent 265,960 to be invalid, by substituting therefor a declaration that "the claims in Patent 265,960, as made by the Patentee in the specification as originally filed" were invalid. It is apparent from the reasons given that this amendment was made to avoid the risk of the patent, as it then existed after the filing of the disclaimer, being declared void in that litigation. Neither the validity of the disclaimer nor that of the patent, as it stood after disclaimer, was passed upon.

"The defendant discontinued paying royalties under the agreement after a payment made on 7th July, 1937, which paid the royalties up till 30th June, 1937.

"Mr. J. D. C. Forsyth, president of the defendant company, stated that after the higher Courts of Canada declared the patents invalid the company stopped paying royalties within a reasonable length of time. The company did continue to a degree to manufacture the same class of articles as before and to utilize the alleged improvements mentioned in the agreement in question.

"The learned trial judge held in effect that the judgment in the *B.V.D.* action released the defendant from its obligation to pay royalties; that in any event the result of that judgment was to give the defendant the right to challenge the disclaimer filed, and thereby the validity of patent 265,960, and that the disclaimer was invalid, and further, that the parties had themselves treated the licence agreement as at an end.

"The case turns largely on a consideration of the license agreement in question made between Celanese and the defendant. While portions of this are of minor importance, it is probably desirable that it be set out in full:

" 'WHEREAS the Licensee desires to secure a non-exclusive and non-transferable license under the following Canadian Letters Patent:

"Camille Dreyfus, No. 265960 issued November 16th, 1926.

"Camille Dreyfus, No. 311185 issued May 12th, 1931.

" 'AND WHEREAS Celanese is the owner of each of the above mentioned Letters Patent.

" 'NOW THEREFORE, Celanese and the Licensee, in consideration of the premises, and in consideration of the payment of One Dollar (\$1.00) by each of them to the other paid, receipt of which is hereby acknowledged, and for other good and valuable consideration, have agreed and do hereby agree as follows:

" '1. Celanese agrees to grant and hereby does grant to the Licensee, subject to the provisions hereof, all of which are conditions of such grant, a non-exclusive and non-transferable license to use the improvements of said Letters Patent under said patents, to make and sell collars, bosoms and cuffs that are attached to or are parts of men's shirts or detached collars made and sold only with shirts of identical material (not exceeding two per shirt), hereinafter called "matched" collars (but no other detached or loose collars or any detached or loose bosoms or cuffs), as fully as Celanese may by virtue of such patents, for the full term for which said Letters Patent have been granted, upon the conditions and subject to rights of cancellation as herein set forth.

" '2. The Licensee accepts said non-exclusive and non-transferable license and agrees that all such rights as are herein granted are personal to the Licensee and that this license

does not confer upon the Licensee any right to grant sub-licenses.

“3. The Licensee agrees to pay to Celanese the sum of Three Hundred Dollars (\$300.00) at the signing and delivery of this agreement and agrees to pay a minimum monthly royalty of Three Hundred Dollars (\$300.00) in advance on the first day of August, 1935 and on the first day of each month thereafter. Minimum royalty payments made in each calendar year shall be credited against other royalties set forth in paragraph numbered “4” hereof but this only to the extent that such other royalties shall be payable in the same calendar year, the intent being that in any calendar year the aggregate of all royalty payments by the Licensee shall equal (a) the total of the minimum royalties payments specified for that year, or (b) the total of the earned royalties payable in that year under the provisions of paragraphs 4 and 5 hereof, whichever of said totals is the larger.

“4. The Licensee agrees to pay Celanese the following royalties:

“‘(a) for shirts manufactured by the Licensee with stiffened attached or “matched” collars and/or cuffs (but not bosoms) made with or containing cellulose acetate or other derivative of cellulose a royalty of twenty-five cents (25c.) per dozen for each dozen shirts so manufactured by the Licensee.

“‘(b) a royalty of fifty cents (50c.) per dozen for each dozen shirts manufactured by the Licensee with stiffened attached bosoms with or without attached or “matched” collars or attached cuffs, made with or containing cellulose acetate or other derivative of cellulose.

“5. On the 15th day of each month after date hereof, the Licensee will furnish to Celanese certified statements of all manufacture during the preceding calendar month of articles described in paragraph number “4” hereof. On the 15th day of January, April, July and October of each year, the Licensee will pay to Celanese the royalty payments on all manufacture in the preceding three calendar months as provided in paragraph numbered “4” hereof. Certified statements of manufacture of articles shall be signed under oath by two officers of the Licensee if a corporation, by two partners if a partnership, or be signed by a certified public accountant approved by Celanese.

“6. All minimum and other royalty payments shall be made by the Licensee at the office of Celanese in Montreal, P.Q., or at such other place or places in the Dominion of Canada as Celanese may from time to time designate by written notice to the Licensee.

“7. (a) Celanese agrees that as long as this License remains in effect and the Licensee pays the royalties as in this agreement provided it will not sue the Licensee for infringement of any patent now owned or controlled or hereafter acquired or controlled by Celanese and relating to the goods specified in paragraph numbered “4” hereof.

“(b) All developments and improvements made by the Licensee in the use of cellulose acetate or other derivative of cellulose in the art of laminating fabrics containing cellulose acetate or other derivative of cellulose in any form and to any extent and in articles made therefrom and all applications for Letters Patent pertaining thereto shall be made on behalf of Celanese and shall be assigned to Celanese and shall become a part of the subject matter of this agreement.

“8. The Licensee agrees to keep true and complete records and books of account, including job records, accurately to show operations under the terms of this agreement and Celanese is hereby given the right of access to the plants, the records and to the books of account of the Licensee for the purpose of verifying said statements as to royalty payments, said access to be at reasonable business hours.

“9. The Licensee will mark all products made or sold in accordance with this agreement with a proper patent notice by label or stamp in such manner and form as it may be from time to time advised by Celanese.

“10. The Licensee is not given any right whatsoever to sue infringers of any of said patents or patents to be issued, but Celanese reserves to itself full, complete and exclusive discretion to determine the advisability of filing any suits against infringers and to file and prosecute only such suits, if any, as in its discretion are desirable or necessary.

“11. The Licensee admits the validity of the patents referred to herein and agrees not to contest the validity of any of the aforesaid patents and agrees not to become voluntarily a party directly or indirectly to any procedure disputing the valid-

ity or tending to impair the value of any of said inventions or Letters Patent covering the same, during the period of this license and at all times thereafter except as to such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken.

“ ‘12. The Licensee agrees not to use the name of Celanese in connection with any products manufactured under this license, except upon such conditions as may be hereafter prescribed by Celanese.

“ ‘13. In case of the receivership, bankruptcy, forced assignment, or other financial difficulty by reason of which the Licensee is prevented from carrying out the terms of this agreement, then all rights granted hereunder to the Licensee may be terminated by Celanese, at its election, upon written notice to the Licensee.

“ ‘14. The Licensee may at its election be relieved of obligation to pay the minimum monthly royalty upon the following conditions,

“ ‘(a) The Licensee shall give to Celanese before the end of any calendar year after 1937 three months written notice by registered mail of its election to discontinue minimum monthly royalty payments from and after the end of that calendar year;

“ ‘(b) After receipt of such notice from the Licensee, this agreement shall continue in effect in all other particulars subject to the right of Celanese to terminate this agreement upon three months notice;

“ ‘(c) No notice of election by the Licensee to discontinue the minimum monthly royalty may be given while the Licensee is in default of any payment of royalty.

“ ‘15. If at any time Celanese should waive its rights due to any breach of any of the provisions of this agreement, then such waiver is not to be construed as a continuing waiver of other breaches of the same or other provisions of this agreement.

“ ‘16. In the event that the Licensee shall default in the performance of any of its obligations hereunder, then Celanese has the right to cancel this agreement upon giving the Licensee thirty days written notice, the cancellation of the agreement to be effective at the end of said thirty-day period unless the Licensee shall have removed said condition of default within said period.

“‘17. In the event Celanese shall hereafter grant to any other Licensee a license covering the same subject matter with lower royalty, except minimum royalty, the Licensee shall be thereafter entitled to said lower royalty.’”

4th to 10th December 1940. The action was tried by CHEVRIER J. without a jury at Ottawa.

O. M. Biggar, K.C., and *R. S. Smart, K.C.*, for the plaintiff.

C. F. H. Carson, K.C., and *H. K. Thompson*, for the defendant.

2nd September 1941. CHEVRIER J. (after dealing fully with the evidence):—Mr. Biggar, for the plaintiff, argued that the action is one for a debt assigned, that the assignee had given written notice of the assignment as provided for by s. 52(1) of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152; that the patents under which the claim is made are valid; that the defendant cannot dispute the validity of the title; and that at all events, if the final disposition of the matter rests upon the validity or otherwise of the disclaimer, then the disclaimer was valid, there having been a clear mistake as to the interpretation of the patent.

Mr. Carson, for the defendant, argued that the document sued upon is a contract, of 17 clauses, which must be looked at as a whole, and he proceeded to do so, directing himself to each clause. I need not follow him in that way, but I shall direct my consideration to the vital clause.

By clause 11, the licensee admits the validity of the patents and agrees not to contest their validity. But though it contains the stipulation that the licensee shall not contest the validity of the patents “during the period of this license, and at all times thereafter”, yet it contains this proviso: “except as to such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken.”

Mr. Carson therefore argued that upon (A), patent 311,185 having been declared invalid, null and void by the judgment of the Exchequer Court in the *B.V.D.* case, 26th March, 1936, and no appeal having been taken therefrom, the liability of the Forsyth Company to pay any further royalties came at once to an end under clause 11 of Exhibit 8; that an appeal was taken to the Supreme Court in respect of patent 265,960, which had been upheld by the Exchequer Court, and that the Supreme

Court having declared that, (B), said patent was invalid, the Privy Council approved such decision, subject only to the effect thereon of the disclaimer; that those facts, (A) and (B) now enable the defendant, under the excepting proviso of clause 11 of Exhibit 8, to set up, as a defence to the present action, the non-validity of patent 311,185, and further that, if patent 265,960 should not be invalid, it is not now, for the reasons alleged, the same patent as it originally was when Exhibit 8 was entered into; that in consequence of (A) and (B), or of either of them, the defendant is, under clause 11, relieved from the obligation of paying royalties.

Patent 311,185 having been declared invalid, does that enable the defendant itself to raise that defence in an effort to be relieved of its obligation to pay royalties? Mr. Carson argues yes, Mr. Smart replies, no. If there was but that one patent to be considered, the question might be answered right here, but counsel for the defence desires a ruling as to the effect of the disclaimer (Exhibit 1) on patent 265,960, as passed upon by the Supreme Court of Canada.

In my opinion the clear language of clause 11, and of its excepting proviso, coupled with the undisturbed finding by the Exchequer Court of the non-validity of patent 311,185, does enable the defendant to plead the non-validity of 311,185 as a defence herein. I am here, however, concerned with the statement found in Terrell, 4th ed., p. 218, as quoted by Riddell J. in *Duryea v. Kaufman* (1910), 21 O.L.R. 161, at p. 174: "Unless the licensor has covenanted for the validity of the patent in express terms, the licensee will be estopped from alleging its invalidity in answer to an action for royalties, even though the patent has been declared void in other proceedings." That statement is to be found in Terrell's 4th edition, but I am unable to find it in the same author's 8th edition, which is the latest one. That judgment was given 21 years ago. There is also the principle that each case is governed by its own set of circumstances, and, in the case cited, there was not an express stipulation as there is here in clause 11 of Exhibit 8.

By the terms of the agreement (Exhibit 8), clause 11, the two patents can and may be considered separately: "except as to such *patent* or *patents* as may be adjudicated invalid". In the face of that, I must, and I do, find that the defendant may

avail itself of the opportunity of raising the invalidity of patent 311,185, and successfully resist the payment of royalties. But from what date?

Mr. Carson submits that while he may not be able to recover the royalties paid, yet as soon as one, or the two patents, have been declared invalid, he cannot be made liable for unpaid royalties, no matter in what respect or for what period they were unpaid.

The words of the agreement (Exhibit 8) are "a court of competent jurisdiction from whose decision no appeal is or can be taken". This is not a statutory enactment, and is not to be construed strictly. It is true that in this case no appeal lay to the Privy Council as of right, but an appeal could be, and was, had on leave.

The last payment of royalties was on 7th July, 1937, for the period ending the last of June, 1937. Since then the Privy Council has disposed of the Supreme Court judgment.

I therefore find that no royalties can be lawfully exacted after the date of that last payment.

The question now is, what is the effect, if any, on patent 265,960 of filing the disclaimer, Exhibit 1? It may be well here to repeat the wording of s. 50, of The Patent Act, 1935 (Dom.), c. 32, under which a disclaimer may be filed. It is as follows:

"50. (1) Whenever, by any mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has

"(a) made his specifications too broad, claiming more than that of which he or the person through whom he claims was the first inventor; or

"(b) in the specification, claimed that he or the person through whom he claims was the first inventor of any material or substantial part of the invention patented of which he was not the first inventor, and to which he had no lawful right; he may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment thereof."

We are here concerned with subs. (1) only. It is to be noted that the wording is "Whenever, by any mistake, accident or inadvertence, *and* without any wilful intent to defraud . . . a *patentee* has . . . ," etc. Mr. Carson's submission is that

the conditions that are set out at the beginning of the provision, must of course exist before the patentee has any right to disclaim. That is to say, there must have been mistake, accident or inadvertence without any wilful intent to defraud or mislead the public, causing the patentee to make his submission too broad; and that those conditions must exist before the patentee has any right to come into the patent office and file a disclaimer, or before any disclaimer, as filed, may be given any legal validity, and that the mistake, accident or inadvertence and the absence of intent to defraud must exist at the time the patentee makes his specification. That, in my opinion, is the meaning of the section, and with that submission I fully agree.

I also agree with the further submission that the question is, was there on the part of Dreyfus in 1925, any mistake, accident or inadvertence in making his specification as broad as he did, and was it done with any wilful intent to defraud or mislead the public? . . .

The Supreme Court judgment was written by Davis J. who went into the matter in a most thorough and complete manner. No useful purpose would be served by going over matter which has been so exhaustively and so ably covered, and from which it clearly appears that in describing the claims, Dreyfus did not adhere to the descriptive part. In other words, the Dreyfus patent was made broad enough to use either a solvent or use a solvent as a plasticising agent. Davis J. concludes ([1937] S.C.R. at p. 230) that "Unless the claims in the Canadian Patent can properly be narrowed by the introduction of a limitation to the use of the cellulose derivative in the form of yarns, filaments or fibres, they are, we think, clearly anticipated by the United States patent of Van Heusen and the British patents of Green and Henry Dreyfus."

Again at p. 233: "Throughout the somewhat long specification there is a continuous reference to the use of thermoplastic derivative of cellulose in the form of yarns, filaments or fibres, and it is plainly the very essence of the disclosure in the specification. Why, then, was it left out of the claims? It may have been a slip of the draftsman or it may have been a deliberate omission in an effort to secure a wider field of protection than the disclosure warranted. The Patent Act, 1923 (Dom.), (13-14 Geo. V, c. 23), in force at the time of the application

and grant of the patent expressly required by subsection (1) of section 14 thereof that the specification 'shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.' "

Then at page 237: "The claims in fact go far beyond the invention. Upon that ground the patent is invalid."

There is a clear, undisturbed finding of fact, that "the claims go far beyond the invention." Now was that done in 1925 by mistake, accident or inadvertence without any wilful intent to defraud or mislead the public?

In rendering judgment on the application for leave for a rehearing, Duff C.J.C., says ([1937] S.C.R. at p. 448):

"It may be observed that, as regards excessive scope of the claims due to the absence of reference in them to the essence of the invention (the presence of cellulose derivative in the form of yarns, filaments or fibres woven into a fabric) the evidence now in the record presents facts casting upon the respondents a burden of explanation by no means trivial."

At no time since, though the occasions for so doing were ample, and particularly during this trial, did the "respondents" (plaintiffs), show any evidence of having made the slightest attempt to meet the burden so cast upon them by the Supreme Court of Canada, *i.e.*, they did not offer any evidence by the party named in s. 50 of The Patent Act, that is the patentee, of the *bona fides* of his mistake, accident, or inadvertence. It is true that he who alleges fraud must prove it. The onus is on him to do so. But here I find, from the wording of the section itself, that the onus is on those who were responsible for disclaiming, to show that there was mistake, accident or inadvertence, and that there was no wilful intent to deceive. The onus is clearly on the patentee, to establish his good faith, where the disclaimer is challenged.

In this case, the patentee is, according to the evidence, alive, in good health, and in New York. He knows, or should know, or his associates or counsel know, what the Supreme Court of Canada has expressed in a unanimous judgment about that particular feature of the case, and he chooses to be silent.

I find as a fact that there is no oral evidence of any mistake, accident or inadvertence.

Consideration of Exhibits 46A, 46B, 44, Exhibit 51, and particularly Exhibit 3, cast some light upon the conditions under which the operations were allowed to be carried on, after the issuance of the patent 265,960 in 1925. In Exhibit 3, a letter of 1st March, 1927, from British Celanese Ltd. (T. L. Whitehead) to American Cellulose, there appears this very significant paragraph:

"We note however that the present claims are not adapted to bring out the distinguishing feature of the invention very clearly, and we therefore think it necessary to amend these claims on the same lines as the claims in No. 75654 were amended. This would entail the insertion of the words *yarns comprising* after the words 'contains' or 'containing' in each of the claims."

The Canadian patent 265,960 had been granted in November, 1926; upon receipt, in March, 1927, of Mr. Whitehead's letter, Exhibit 3, the patentees did not disclaim in Canada, but continued to carry on with the 25 claims contained in the patent; was it to obtain the benefit of such wide scope so long as no one noticed it or interfered? They also had notice of the too wide scope of the application, by the formal letter on page 22 of the American file wrapper (Exhibit 44), and at p. 24, 29th June, 1927, when all the claims were again rejected, and notice of further amendments on 17th November, 1927; can it be said, when they so strongly featured throughout the application of a cellulose derivative in the form of yarns, that it might have slipped their mind and been a mistake in draughting? I cannot, and do not, so conclude.

From all that, I conclude, and find as facts, first, that the plaintiff has failed to discharge the onus of establishing good faith in filing the disclaimer; secondly, that there is no evidence of mistake, nor of accident, nor of inadvertence, but that there is evidence of an acquiescence or *laissez faire*, with the full knowledge of the too broad scope of the claims by the patentee and his associates, which state of affairs was allowed to be persisted in, until litigation arose. The plaintiff has failed to convince me otherwise.

I find, therefore, that the disclaimer as filed does not meet the requirements of s. 50 of The Patent Act, and is therefore invalid.

Mr. Carson also argued that "on the true construction of clause 11 of the agreement as a whole we are relieved of pay-

ment of royalties", and, secondly, "I put it that, if it cannot be found by express language, then it is something that necessarily must be implied." I have no hesitation in saying that the language used in that clause is clear, and cannot and does not leave any doubt that the licensee may contest the validity of "such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken."

It is true that Exhibit 8 contains the following stipulations: "Celanese agrees to grant and hereby does grant to the Licensee, *subject to the provisions hereof*, all of which are conditions of such grant, a non-exclusive and non-transferable license . . . *for the full term* for which said Letters Patent have been granted, upon the conditions and subject to rights of cancellation as herein set forth."

One of those conditions was the right to contest the validity of the patent or patents.

The agreement contains no express stipulation that upon the patent or patents having been declared invalid, the payment of royalties shall cease. But it is submitted that it follows by necessary implication, and in support numerous authorities are quoted. After considering them, and the argument *contra* submitted by Mr. Smart, I conclude that that submission is correct, particularly in view of the conduct of the parties; the defendant company stopped paying royalties after the end of June, 1937, having at that time two judgments of the Supreme Court in its favour, and at no time thereafter did it receive any demand for payment from any one, except by writ issued by the present plaintiff, which was not a party to the original agreement, Exhibit 8; though Canadian Celanese wrote plaintiff on 3rd March, 1938 (Exhibit 14), and 25th August, 1938 (Exhibit 15), about the litigation, peculiarly enough it did not mention payment of royalties. The same applies to the present plaintiffs, as shown by Exhibits 10 and 16 to 38. That is further strengthened by the fact that, for a long time, Liebowitz, the president of the plaintiff company, endeavoured to have the defendant become licensee under a new agreement. The submission to the plaintiff of the proposed agreement, Exhibit 29A, and the participating agreement, conclusively show that Celanese Corporation and Trubenizing Process both recognized that Exhibit 8 had been terminated.

Another ground of defence is with respect to clause 6 of Exhibit 8, which is as follows: "6. All minimum and other royalty payments shall be made by the Licensee at the office of Celanese in Montreal, P.Q., or at such other place or places in the Dominion of Canada as Celanese may from time to time designate by written notice to the Licensee."

There is no evidence that Celanese at any time communicated any designation to the defendant. I have already held that no notice of the place where payments of royalties were to be made was ever given to the defendant.

Mr. Smart contends that by the continuance of royalty payments after patent 311,185 had lapsed for a period of one year, the defendant has waived any alternative construction of clause 11. I cannot follow him there. He has not strongly pressed that point, nor can I see how he could successfully do so. The defendant might have been entitled to discontinue payments from the date of the judgment of the Exchequer Court, but decided to pay on in view of the uncertainty of the state of the litigation; the judgment of the Exchequer Court was a judgment from which an appeal could have been taken. Nor can I, after this finding, accept Mr. Smart's contention, that when and if, after patent 311,185 became invalid, and the licence under it and under patent 265,960 terminated, the defendant became an infringer for that period already spoken of. Mr. Smart further contends that, if patent 311,185 did terminate, the defendant failed to give notice under clause 14.

Clause 14(a) is as follows: "The Licensee shall give to Celanese before the end of any calendar year after 1937 three months written notice by registered mail of its election to discontinue minimum monthly royalty payments from and after the end of that calendar year". That does not apply when the patent, as here, is declared invalid at the instance of some one who is not the plaintiff.

A further contention by Mr. Smart is that by the decision rendered in *Mills v. Carson et al.* (1892), 10 R.P.C. 9, and others, the licensee is bound to pay royalties during the full term of the existence of the patent. That and all the other cases cited quite properly follow the principle that though the patentee neglected to pay the renewal fee, yet the licensee was bound to pay the royalties, but there it is plain that the reason for

that is expressed by Matthew J. in *African Gold Recovery Company, Ltd. v. Sheba Gold Mining Company, Ltd.* (1897), 14 R.P.C. 660, at 663, as follows:

“ . . . you deliberately make an agreement to pay a certain royalty as long as the patented process is used . . . a licensee under a patent . . . is bound to adhere to the terms of his agreement as long as he uses the patented process”. But in the case under consideration the principle involved, is a totally different one. Patent 311,185 had been declared invalid and no appeal taken, and the claims of 265,960 had been declared invalid. I know of no rule of law under which a licensee could be ordered to continue to pay royalties under such patents, when he has ceased to exercise whatever rights he might have originally covenanted for under those patents, and has done so because the patents under which he is obligated to pay have been declared invalid.

Mr. Carson submits that under the agreement, Exhibit 8, royalties or claims to royalties were not severable, that is, that if one patent is declared invalid, the licensee cannot be forced to continue to pay, just because the other patent has not also been finally declared to be invalid.

The defendant having pleaded the invalidity of patent 265,960 in its defence, did not specifically direct any evidence to the establishment of such claim, but has relied on arguing its invalidity, by pleading the invalidity of the disclaimer. The Privy Council has found that “if there had been no disclaimer, the Patent would be invalid and void.” (Judgment delivered by Lord Russell of Killowen, Exhibit 60).

I have found that the disclaimer does not meet the requirements of s. 50 of The Patent Act and is therefore void; it is therefore to be treated as non-existent, and of no force or effect; that, therefore, leaves patent 265,960 in its original form, with its claims too broad, and, as the Supreme Court of Canada has found, anticipated by earlier patents, with the result, as the Privy Council has above declared, that “if there had been no disclaimer the Patent would be invalid and void.” Having found the non-validity of the disclaimer, I do declare patent 265,960 to be invalid and void.

In conclusion I find:

1st, Patent 311,185 invalid;

2nd, Patent 265,960 invalid;

3rd, that, as a result thereof, the defendant is entitled, under clause 11 of Exhibit 8, to set up such invalidity, as an answer to the plaintiff's claims for royalties;

4th, that such answer constitutes a complete defence to such demand;

5th, that the only royalties payable by the defendant to the plaintiff are such as were paid on 7th July, 1937, for the period ending at the end of June, 1937;

6th, that no notice of place for payment of royalties was given to the defendant, either by Celanese, as called for by clause 6 of Exhibit 8, or by the present plaintiff.

The plaintiff's claims and action, as expressed in the statement of claim, are hereby dismissed with costs.

January 26th, 27th and 28th, 1942. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

O. M. Biggar, K.C., for the appellant: The trial judge was in error in finding that the mailing of notice of assignment to the respondent was not proved. There was much correspondence with the respondent, in which the assignment was referred to.

The licensing agreement is specific, and provides for the payment of royalties at certain rates. The appellant claims only minimum royalties. The obligation to pay royalties ceases only with the termination of the agreement. Clause 11, providing that the licensee shall not contest the validity of the patents, is not coupled with the clause providing for royalties.

In the absence of special provision in the licensing agreement, the validity of the patents is immaterial, and does not affect the obligation to pay royalties: *Anderson v. E. J. Shepard Ltd.*, 66 O.L.R. 105, at 110, [1931] 1 D.L.R. 204. The licensing agreement is not terminated merely because one of the patents has been held invalid. The licensee might wish to continue the agreement with respect to the remaining patent: *Cummings v. Stewart* (1912), 30 R.P.C. 1. There is no evidence that the shirts manufactured by the respondents required the use of both patents. A declaration that patent 311,185 is invalid does not deprive the respondent of the right to carry on under patent 265,960, and the licensing agreement is not terminated, and the licensee is therefore still bound to pay royalties. *Cummings v. Stewart, supra*, is distinguishable in this respect, since there

it was held that each patent was a substantial part of the subject matter of the contract.

The respondent is not entitled to challenge the validity of patent 265,960. S. 49 of The Patent Act, 1935 (Dom.), c. 32, gives the right to disclaim, and so far as the claims of the original and the reissued patents are concerned, the position between the parties remains the same. S. 50(5) provides that the patent, as amended by the disclaimer, shall be valid. [ROBERTSON C.J.O.: Why is the respondent not entitled to say that the amended patent is something less than it bargained for, on ordinary principles of contract, without reference to clause 11 of the contract?] The words of the original patent had a wider meaning than we intended; there is no suggestion by the respondent that it was misled thereby. The appellant's exercise of its statutory rights under ss. 49 and 50 of The Patent Act cannot terminate the licensing agreement.

The licensee's obligation to pay royalties continues even after a breach of the agreement by the licensor: *Mills v. Carson et al.* (1892), 10 R.P.C. 9, 9 T.L.R. 80. [ROBERTSON C.J.O.: In that case the licensee was to pay royalties for a stated term]. In *Lines v. Usher* (1897), 14 R.P.C. 206, a Court similar to that which had heard *Mills v. Carson* reached an opposite conclusion, but that case depended upon the construction to be placed on the terms of the particular agreement. In the case at bar there are independent covenants.

The licence is one to use the invention. The patent covering the invention may be invalid, because of poor definition, but that does not destroy the invention. [ROBERTSON C.J.O.: That is not arguable, in view of clause 1]. The respondent received the right to use the improvements under the patents.

R. S. Smart, K.C., for the plaintiff, appellant: By s. 50(2) of The Patent Act, the disclaimer, when filed, is deemed to be part of the original specification. There has been no judgment declaring invalid the patent in its present form. The Privy Council found only that the claims of the original specification were invalid.

Under the agreement, the licensee received the benefit of a waiver by the licensor of all rights of action for infringement, and that waiver extended to past infringements. The trial judge found that the licence was still in force, but that the licensee

was not obligated to pay royalties. The covenants in the licensing agreement are not reciprocal. The payment of royalties at a monthly rate is a deferred payment of the purchase price of the licence.

The granting of an exclusive licence is not higher than an assignment, and does not include a warranty of the validity of the patents: *Mills v. Carson*, *supra*; *Duryea v. Kaufman* (1910), 21 O.L.R. 161. The licensee must accept the patents subject to the statute. The patentee may avail himself of the statutory right to disclaim, if he thinks it necessary, without affecting the licensee's liability.

There is an analogy in these cases to cases between landlord and tenant, as pointed out in *African Gold Recovery Company, Ltd. v. Sheba Gold Mining Company, Ltd.* (1897), 14 R.P.C. 660, at 663.

The trial judge erred in not considering the possibility of a mistake of law being within the term "mistake" in s. 50(1) of The Patent Act: Walker on Patents, Deller's ed., vol. 2, p. 1291.

C. F. H. Carson, K.C. (*J. G. Middleton* with him), for the defendant, respondent: The respondent does not dispute the general rule that a licensee is estopped from denying the validity of the patent, but the general rule is subject to the express terms of the licensing agreement, *i.e.*, in the case at bar, to clause 11. In *Anderson v. E. J. Shepard Ltd.*, 66 O.L.R. 105, [1931] 1 D.L.R. 204, there was no clause corresponding to clause 11.

The licensing agreement must be read as a whole; clause 11 refers to both patents, and constitutes one of the conditions under which, by clause 1, the use of the patents was licensed.

The licensee did not agree to pay royalties for the full term of the patents, but only for the term of the licensing agreement. In *Mills v. Carson et al.* (1892), 10 R.P.C. 9, it was because the covenants were not expressly made conditional that the defendant was held not to be absolved from the payment of royalties. When patent 311,185 was declared invalid, the licensee, under clause 11, was entitled to stop paying royalties. A new agreement might be made respecting the use by the licensee of patent 265,960. If the plaintiff contends that the defendant is still using that patent, it should sue for infringement.

Under clause 4 of the agreement, the payment of royalties is not divisible for the use of each patent—no proportion is made

chargeable to one or other of the patents: *Cummings v. Stewart* (1912), 30 R.P.C. 1, at pp. 14, 15.

When the licensor lost its right to one patent and amended the other to save it from being declared invalid, the subject matter of the licensing agreement was changed. The agreement referred to patent 265,960 as it was at the time of the agreement. The amended patent of that number narrows to a marked degree the scope of the invention as originally claimed, and cannot be taken to be for the same invention. The effect of s. 50 of The Patent Act is limited in cases where the rights of a licensee of the original patent are to be considered. The licensee paid royalties for the protection of the broad claims in the patent, even if it did not make use of all of them.

The respondent is entitled to challenge the validity of the disclaimer in this action. The trial judge was right in finding the disclaimer invalid. It is not a proper disclaimer. The amended description should refer to the same invention as the original patent. The terms on which the disclaimer may be filed, as set out in s. 50, must be strictly observed. When the disclaimer is challenged, the onus shifts to the patentee to show inadvertence, accident or mistake. The appellant should have called the patentee to give evidence on this point: *Northern Electric Company Ltd. and Western Electric Company, Inc. v. Photo Sound Corporation and George Perkins*, [1936] S.C.R. 649, at 651, 659-61, 679, [1936] 4 D.L.R. 657; *Fuso Electric Works et al. v. Canadian General Electric Company, Limited*, [1940] S.C.R. 371, at 378-380, 383, [1940] 2 D.L.R. 1; *V. D. Ltd. v. Boston Deep Sea Fishing and Ice Company Ltd.* (1935), 52 R.P.C. 303, at 331; *B.V.D. Company, Limited v. Canadian Celanese Limited*, [1937] S.C.R. 441, at 448, [1937] 4 D.L.R. 449. Clause 11 refers to patents then in existence, not to patents of which parts may be disclaimed.

After the Privy Council decision in the *B.V.D.* litigation, the respondent received no claim or demand for royalties. This indicates the interpretation put upon the licensing agreement by the parties.

There was no notice of the assignment to the plaintiff. The trial judge found that the mailing of the letter containing the notice was not proved, and his finding in this respect should not be disturbed. Other letters received from the appellant, were

not sufficiently express to constitute notice of assignment; such notice must be unequivocally expressed: *McMillan v. Orillia Export Lumber Co.* (1903), 6 O.L.R. 126, at 129.

The licensing agreement provided for the giving of written notice of the place at which royalties were to be paid. No such notice was received by the respondent: *Simson and Macfarlane v. Young* (1918), 56 S.C.R. 388, at 411, [1918] 2 W.W.R. 62, 41 D.L.R. 258; *Thorn v. City Rice Mills* (1889), 40 Ch. D. 357; 7 Halsbury, 2nd ed., p. 195.

A licence implies that the licensee shall not be evicted from its enjoyment, and such an eviction is a defence to an action for royalties accruing after its occurrence: Walker on Patents, Deller's ed., vol. 2, p. 1494.

O. M. Biggar, K.C., in reply: There was no failure of consideration. The filing of the disclaimer did not lessen the value of the patent, but in fact provided additional consideration by changing a possibly invalid patent into a valid one.

There was no express warranty of validity here as in the case of *Lines v. Usher, supra*.

The cases cited by the respondent on s. 50 of The Patent Act all dealt with attempts to extend the scope of the patent, not with narrowing it.

As to the meaning of "invention", see *British United Shoe Machinery Company Ltd. v. A. Fussell & Sons Ltd.* (1908), 25 R.P.C. 631, at 651-2.

The licensee is not entitled to dispute the validity of patent 265,960 as amended. The evidence shows that it could continue using the patent, as amended, and paying royalties therefor.

Cur. adv. vult.

25th April 1942. ROBERTSON C.J.O.:—I have had the privilege of reading the judgment of Gillanders J.A., and I concur in his reasons and in the result at which he has arrived.

The general principle that a licensee under a patent of invention is not entitled to dispute the validity of his licensor's patent is no doubt well settled, and in any event in this case the licensee has expressly admitted the validity of the patents by clause 11 of the licensing agreement. This is, however, made subject to an express reservation that excludes "such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken."

Notwithstanding this reservation I do not think that the result of such an adjudication of invalidity in respect of one or even both of the licensor's patents is that the licensing agreement is thereby put an end to. Certainly if only one of the patents were found to be invalid, it would not be right that the licensee should be deprived of the benefit of the licensing agreement in respect of the other patent. The remaining patent may be the only one that is useful to him, and it would be an inequitable result if the licensor's failure to sustain his title to one of the patents as to which the licensee is indifferent, should deprive the licensee of the benefit of his licence in respect of the other patent which he values. The licensee may have a right of election to declare the licensing agreement at an end, depending upon the extent to which the licensor thereby becomes unable to carry out his part of the agreement and to give the licensee that for which the licensee has agreed to pay. The licensee must exercise his right of election, and he may do so by conduct as well as by words.

In the present case, in my opinion only one of the two patents, No. 311,185, became the subject of an adjudication of invalidity by a court of competent jurisdiction from whose decision no appeal was or could be taken within the exception at the end of clause 11 of the licensing agreement. Patent No. 265,960 was not adjudicated invalid by the Judicial Committee, to whom the final appeal was taken. No doubt the disclaimer filed by the licensor in respect of this patent may have been in derogation of the licensee's rights under the licensing agreement, but the result of it must, I think, largely depend upon the importance to the licensee of what was disclaimed. What remained may have been all that was of value to him. Again I think he may have had a right of election. There is not much to be gathered from the evidence as to the value to the licensee of what was disclaimed and of what remained of this patent. There is evidence that he continued, down to the time of the trial, to manufacture goods that fell within the description of what remained of the patent after disclaimer. For a comparatively short time he continued to pay royalties, and then ceased paying. Nothing appears to have been said by one party or the other when the payment of royalties ceased. The licensee discontinued the making of monthly statements of its manufacture and paid nothing, and the licensor made no request or demand for either

statements or payment at any time thereafter. The last payment made by the licensee was made on 7th July, 1937, paying royalties accrued to 30th June, 1937. The licensor made the assignment under which the plaintiff claims in this action, on 1st May, 1939. While there were letters from the licensor to the licensee with respect to the progress of the litigation respecting patent No. 265,960, in 1938, nothing was said on the subject of royalties. Whether or not the licensee continued to mark its products with a reference to the licensor's patent, as provided in clause 9 of the licensing agreement, does not appear from the evidence. There may be matters arising from the correspondence of the plaintiff with the licensee, and also with the licensor, that are proper to be considered in determining whether or not the licensing agreement was terminated either by the election of the licensee or by abandonment by the licensor, and as the question was not fully argued I prefer to express no opinion upon it.

In my opinion the assignment from the licensor under which the plaintiff claims the royalties sued for is not such an assignment as entitles the plaintiff to maintain an action in his own name to recover them without joining the licensor, and I doubt whether there was any proper notice of the assignment to the licensee before suit. This has been dealt with at some length by Gillanders J.A., and I have little further to say about it. As I have already stated, the licensing agreement stands as to both patents mentioned in it, unless the licensee, having acquired a right to elect against it, did so, or unless both parties, by their conduct, treated it as abandoned, in either of which events the plaintiff has no claim. Assuming then, for the present purpose, that the agreement stands, the royalties it provides for are payable in respect of two patents, while the assignment of its claim for royalties made to the plaintiff by the licensor on 1st May, 1939, covers only royalties under licences in respect of one of them. The assignment of 1st May, 1939, is in general terms only. It does not identify this licensing agreement in particular. Further, for all that appears on the record, the royalties sued for may have, in whole or in part, accrued in respect of the patent, No. 311,185, under clause 4 of the licensing agreement. If the present plaintiff should recover in this action, what assur-

ance is there that a claim will not be made by the licensor under the same agreement?

I agree that the appeal should be dismissed with costs.

HENDERSON J.A.:—An appeal from the judgment of Chevrier J. dated 2nd September, 1941, in an action for royalties under certain letters patent of invention, two in number.

I have had the privilege of reading the opinion of my brother Gillanders, and I wish to adopt his statement of the facts of the case, and I agree with his conclusion that the appeal should be dismissed with costs.

Upon the argument it was said that one who has taken a licence to use an invention covered by letters patent, and agreed to pay royalties, must continue to pay such royalties although the patent may have been adjudged invalid, upon the principle that if the contract is silent upon the matter he is not entitled to set up the invalidity of the letters patent. It is not clear to me how a licence to use an invention can continue to exist after it has been adjudged that the invention either never existed or has ceased to exist.

However that may be, the case at bar turns upon the contents of the agreement between Celanese and the defendant, which is not an agreement of the kind just referred to.

Treating the matter as though this action were by Celanese as plaintiff against the defendant, I am of opinion that the entire foundation for the licence agreement has disappeared. Patent No. 311,185 has been held to be invalid by the Court of last resort, and Patent No. 265,960, which was the remaining subject-matter of the licence agreement, no longer exists in my opinion, so far as it was part of the subject-matter of the agreement. It is true that there are letters patent of the same date and number, but of different contents, the entire claims therein having been substituted for the claims as they were contained at the time the parties made their agreement, and there would appear to me to be no agreement between the parties with respect to the present patent 265,960, as it now appears.

By its voluntary act, the patentee, without consultation with the licensee, and without any consent or concurrence on the part of the licensee, has chosen to substitute an entirely new set of claims for the claims in respect of which the parties made their agreement, and which have been held invalid by the Court

of last resort. In applications for Canadian letters patent of invention, the inventor, after describing his invention in what are called "specifications", proceeds to say "What I claim is my invention", etc., followed by his claims. Letters patent No. 265,960 in respect of which the parties made their contract, no longer contain any of the claims then the subject-matter of the patent. This being so, in my opinion the agreement is at an end, and the defendant has so elected to treat it by its refusal to continue to pay royalties. The trial judge has so found and I see no reason to disturb his finding.

Furthermore, by the agreement, a minimum sum of \$300 per month royalties is to be paid in respect of the licence granted under the two inventions and the letters patent therefor. No provision is made for any division or reduction of royalties in the event of one or other of the letters patent being declared invalid, and I do not know of any principle upon which the entire sum would continue to be payable.

It is said that the defendant has continued to some extent to use the invention, or one of the inventions claimed by the patentee, but to what extent does not appear. This may give rise to some claim on the part of Celanese but cannot, in my opinion, revive the contract.

I have so far treated the matter as though the action were between Celanese and the defendant. The plaintiff however, brings its action, alleging itself to be entitled to do so by virtue of an assignment, which has been discussed by my brother Gillanders. With his conclusion that the plaintiff cannot maintain the action upon that assignment I agree.

In my view Celanese at the time of the alleged assignment had, as against the defendant, neither patents nor claim for royalties to assign.

GILLANDERS J.A. (after setting out the facts as above):— It is not disputed that in the absence of any contrary provisions or intention found in the agreement between the parties the general rule is that the invalidity of a patent is no defence to an action for royalties, and that the licensee is estopped from denying the validity of the patent. See *Anderson v. E. J. Shepard Ltd.*, 66 O.L.R. 105, [1931] 1 D.L.R. 204. The defendant, however, contends that on a fair reading of the licence agreement in this case, with particular reference to clause 11 thereof, it

should be held that upon one or both of the patents being declared invalid, the right to royalties ends, or, in any event, that the defendant is then permitted to contest the validity of the other, or of the disclaimer that was filed in this case.

There was much argument and various submissions made as to how, and in what manner, the provisions of clause 11 should be applied. Counsel for the plaintiff argued that the covenant to pay minimum royalties is independent, and that there is no relation between clause 11 and the provision for the payment of minimum royalties, but, even assuming that there is such a relationship, that its effect was not to relieve the defendant from the payment of minimum royalties by reason of the judgment of the Exchequer Court invalidating patent 311,185, or to permit the defendant to challenge the validity of patent 265,960 as it stands. He submits that there is a field within which the provisions of clause 11 can operate, provided by clause 14.

Counsel for the defendant submits that under clause 1 the grant of the license was made subject to all the provisions of the agreement, and that these are all made conditions of the grant; that this is confirmed by reading the whole agreement, and that the only reasonable effect that can be given to the provisions of clause 11 and the exception at the end thereof, is to bring the obligation for the payment of royalties to an end when one of the patents is finally held invalid; and that, in any event, he is permitted to contest the validity of the disclaimer filed.

There is no doubt room for argument as to how the agreement should be construed respecting the question in issue. It must be read as a whole to discover the intention of the parties and common sense must be applied in its interpretation.

Looking at the whole agreement with a view to giving the provisions of clause 11 a reasonable application, the exception at the end thereof seems futile if the defendant is unable to raise invalidity as a defence in respect of its obligations to pay royalties, at least in respect of such patents as are adjudicated invalid. If such royalties were severable, that fact would, I think, be an answer to such claims. Here the minimum royalties claimed are in respect of both patents. The minimum royalty payable is not divisible between the two patents.

The licensor in filing the disclaimer has narrowed the scope of patent 265,960. The appellant's counsel submits that the

specification and claims of this patent as originally filed meant exactly the same as they do now after the filing of the disclaimer, and that the defendant has not been adversely affected by the disclaimer but has, in fact, been benefited, because the filing of the disclaimer has assisted in the continuance of the patent and the protection of the monopoly licensed.

The Courts have held in the *B.V.D.* action that the claims originally filed were not justified. It was included in the original claims that the process consisted in "subjecting a plurality of associated fabrics, at least one of which contains a thermoplastic derivative of cellulose, to heat and pressure, thereby softening said derivative and uniting said fabrics."

This was found too broad on the ground, among others, in the words of Davis J., that "the claims are not limited to the use of woven cellulose yarns but extend to the use of a cellulose derivative in any form." It is said this is not material to the defendant.

There is nothing in the contract or in the evidence to indicate that one of the patents is more important than the other, nor that the portions of the claims in patent 265,960, which were disclaimed, were immaterial. I cannot assume that the monopoly covered by the invalid patent, and those claims disclaimed by the licensor from patent 265,960, were not material and a substantial part of the consideration.

Patent 311,185 being held invalid, and the claims as originally filed in Patent 265,960 being altered in a material way, the defendant company then had the choice of two courses: it might elect either to abandon the contract, or to continue it. It might have elected to treat the contract as at an end and have discontinued paying royalties; but if it elected this course, it was not, I think, free to continue to work or utilize the alleged improvements for the manufacture of the articles described in the license agreement. The law in this respect is concisely stated in the selections from Williston's Treatise on the Law of Contracts, revised edition, 1938, s. 683:

"Election as a term in the law is properly applied to a case where a person has the choice of one or two alternative and inconsistent rights or remedies. In choosing the one, he necessarily surrenders the other. This principle is not out of harmony with the general rule that the surrender of a right requires

a sealed release or consideration, because the choice made by election gives the one making it an advantage which he could not otherwise have had. Though he surrenders one right, he gains or keeps by so doing another and inconsistent right. Thus where a contract is broken in the course of performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on. If he chooses to continue performance he has doubtless lost his right to stop performance; but in the nature of the case he could not exercise the two inconsistent rights of which he had the choice."

In *Cummings v. Stewart* (1913), 30 R.P.C. 1, the licensor was the owner of three patents; the renewal fees were not paid on two of them and they lapsed. In an action claiming royalties and other relief, it was held that in consequence of the plaintiff's failure to pay the renewal fees a substantial part of the contract became impossible of performance and that the contract ceased to be binding on the defendant; that the consideration for the contract was one and indivisible and could not be apportioned, and that the failure of part was equivalent to failure of the whole and entailed the release of the defendant from the contract. In that case the defendant did not utilize the licence at all under the two lapsed patents and apparently did not continue to work it after declining to pay the royalties.

At the trial, the defendant disputed the validity of the disclaimer filed in respect of patent 265,960, and the learned trial judge gave effect to this submission and found the disclaimer void and patent 265,960 invalid.

Under s. 50(2) of The Patent Act, the disclaimer, on being filed and recorded, is to be deemed part of the original specifications. Patent 265,960, as it now stands, and as it stood when the King's order was issued in the *B.V.D.* action, has not been declared invalid, and the defendant cannot avail itself of the provisions of clause 11 of the contract to reach this result. By this clause the defendant covenants not to be "a party directly or indirectly to any procedure disputing the validity or tending to impair the value of any of said inventions or Letters Patent covering the same".

The defendant cannot through the provisions of the contract attack the disclaimer and thereby affect the letters patent. It may be that in a proper proceeding at the instance of another

party, or if the defendant were permitted to raise the issue, the validity of the disclaimer could be successfully attacked, but it is not open here.

Another point merits consideration. The plaintiff claims to have acquired the rights which it now seeks to enforce under what is called a participation agreement between itself and Celanese dated 1st May, 1939. In and by this agreement, Celanese covenants, *inter alia*, that it is the owner of some seventeen named Canadian patents. Among these is included No. 265,960. Patent No. 311,185 is not included, it having been declared invalid in 1936. By clause 1(a), Celanese granted to the plaintiff an exclusive licence in Canada "under said letters patent or any other patent in the territory owned by Celanese relating to the uniting of fabrics by fusion for use in articles of apparel."

By clause 1(b), Celanese assigns to the plaintiff "all claims for royalties which Celanese may have against its licensees under licenses heretofore granted by it under any of the patents referred to in paragraph 1(a)".

By clause 1(c), Celanese assigns to the plaintiff all royalties and claims for royalties on the manufacture and sale of articles of apparel occurring after 1st May, 1939, which Celanese may have against its licensees under licences previously granted by it under any of the patents within the field of the exclusive licence granted in paragraph 1(a).

Clause 1(a) does not include patent 311,185. That patent is not listed among those assigned, nor at the date of the agreement was it a "patent in the territory owned by Celanese." It was found invalid in 1936, the proper proceedings were taken under s. 62 of The Patent Act, and under that section it thereupon was void and of no effect. The claims to royalties under clauses 1(b) and 1(c) are limited to the patents covered in 1(a). The provisions of clauses 2(a), defining "Canadian Patents", and 2(b), defining "Canadian Royalties", do not extend these terms to include patent 311,185, or royalties payable in respect thereof.

Having no assignment of patent 311,185, or of royalties payable in respect thereof either absolutely or otherwise, the plaintiff cannot succeed in any claim here for royalties in respect of this patent. The title to patent 311,185 never having been in the plaintiff, and the royalties payable in respect of both patents

mentioned in the agreement with Celanese being one and indivisible, I think the plaintiff here must fail.

It is also submitted that in any event there was no express notice in writing of the alleged assignment given to the defendant. At the trial a copy of a letter said to have been sent by Celanese to the defendant company was tendered as evidence of the necessary notice, but the trial judge has found as a fact that the mailing of this was not proved. The plaintiff now relies upon other uncontested evidence as proof of notice. There is a letter from the plaintiff to the defendant dated 18th December, 1939, which, read with certain draft agreements which were enclosed therewith, is submitted as proof of notice. It might put the defendant on inquiry, but is not the express notice required. *McMillan v. Orillia Export Lumber Co.* (1903), 6 O.L.R. 126.

About two months before the action was commenced, the plaintiff's solicitors wrote to the defendant company: "Our clients, The Trubenizing Process Corporation, have had some correspondence with you with respect to the royalties due under the agreement of May 28th, 1935, between yourselves and the Canadian Celanese Limited, the royalties under which have been assigned to our client." The letter proceeds to make a demand for payment. This would appear to be a sufficient notice. *Denney, Gasquet, and Metcalfe v. Conklin*, [1913] 3 K.B. 177.

In the result I think the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Smart & Biggar, Ottawa.

Solicitors for the defendant, respondent: Macfarlane, Thompson, Littlejohn & Martin, Toronto.

[COURT OF APPEAL.]

Re Mary Matilda Young.

Lunatics — Administration of Estates — Appointment of Committee — Rights of Public Trustee—Benefit to Estate—The Mental Incompetency Act, R.S.O. 1937, c. 110—The Mental Hospitals Act, R.S.O. 1937, c. 392, ss. 72, 73, 74, 76, 80.

The jurisdiction of the Court in lunacy matters is an old one, derived from various sources, and now declared and governed by the provisions of The Mental Incompetency Act, R.S.O. 1937, c. 110. Its functions in providing for the management of the estate of a mental incompetent, which are exercised upon well-established principles, are of a character which cannot well be discharged by a public officer with many funds in his care. This attitude of the Court towards the management of the estate, and the appointment of a committee for that purpose, has not been affected by the provisions of The Mental Hospitals Act, R.S.O. 1937, c. 392, nor are the powers of the Court in that regard in any way impaired by the provision of s. 72 of that Act that the Public Trustee shall be *ex officio* committee of the estate of a patient confined in a mental hospital. The necessity for some such provision is obvious, but it is equally plain that the Public Trustee, with his wide and uncontrolled powers, was not intended to be substituted generally for a committee appointed by and acting under the supervision of the Court. The jurisdiction of the Court is a salutary one, and should be exercised, notwithstanding that the Public Trustee has already taken possession of the estate under his statutory powers.

The mere fact that a person has been admitted as a certificated patient to a mental hospital, under The Mental Hospitals Act, is not sufficient to warrant the making, by the Court, of a declaration of mental incompetency under The Mental Incompetency Act. The evidence required by the Court for such a declaration is more extensive than what is necessary under the former Act.

AN appeal from a judgment of Chevrier J., noted in [1942] O.W.N. 82, [1942] 2 D.L.R. 138, on a motion by Herbert Young for a declaration that his wife, Mary Matilda Young, was a mental incompetent and for an order appointing him committee of her estate. The facts are fully set out in the judgment now reported.

14th April 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and FISHER JJ.A.

J. C. McRuer, K.C., for the appellant: The Crown has a prerogative right to administer the affairs of lunatics, and this right is transferred, by s. 2 of The Mental Incompetency Act, R.S.O. 1937, c. 110, to the Supreme Court. The trial judge here declined to exercise the jurisdiction conferred upon him by s. 2. Upon an application to the Court, it becomes the duty of the Court to administer the estate of a mental incompetent. The estate is administered by a committee only as an officer of the Court. It would require clear and definite legislation to take away this prerogative of the Crown.

S. 2 of The Mental Incompetency Act is subject to the provisions of The Mental Hospitals Act, R.S.O. 1937, c. 392, but the latter Act does not purport to oust the jurisdiction of the Court. Ss. 66-71 deal with the maintenance of a patient. S. 72 provides that the Public Trustee shall be *ex officio* committee of the estate of every patient admitted to an institution until he is discharged therefrom; s. 73 states that the Public Trustee shall not be the committee if a committee has been appointed by the Court under The Mental Incompetency Act, unless the Public Trustee is himself subsequently appointed; s. 74 provides for appointment of the Public Trustee as committee by the Court, and s. 76 provides that if a committee is appointed by the Court, the Public Trustee shall cease to act as such.

It is thus abundantly clear that the Court has jurisdiction to appoint a person other than the Public Trustee as committee. The applicant should not be denied the right of having the estate administered under the direction of the Court rather than in the uncontrolled discretion of the Public Trustee. The Crown's prerogative right to administer the estate imports a corresponding duty: *Re Ridler*, 65 O.L.R. 559 at 560, [1930] 4 D.L.R. 597 approved in *Re Trent*, [1937] O.R. 410 at 414, [1937] 2 D.L.R. 140.

The applicant is a lumber manufacturer and dealer, and is the husband of the mental incompetent. He is willing to serve as committee without remuneration.

A. Racine, K.C., Public Trustee, contra: The assets of the patient must be protected, and immediately after her admission to the hospital, the Public Trustee investigated and took over the assets. The estate was administered in the best possible manner. In *Re Ridler, supra*, Orde J.A. considered what was best for the estate, and in the case at bar, I submit the facts to the Court. The appointment of an individual as committee may be costly to the estate.

The prerogative of the Crown passed to the Supreme Court, and thereupon to the Public Trustee, who is *ex officio* the committee. The Legislature has seen fit to give the broad powers contained in s. 80 of The Mental Hospitals Act.

The Public Trustee should not be removed as committee unless cause is shown.

As to the declaration of mental incompetency, the affidavits filed are insufficient, in that they do not state facts. The Court

makes the declaration of incompetency, not the doctors: *Ex parte Persse* (1828), 1 Moll. 219.

J. C. McRuer, K.C., in reply: Costs should not be given out of the estate, since the Public Trustee has opposed the application: *Re Trent*, *supra*.

Cur. adv. vult.

28th April 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the order of Chevrier J., dated 2nd March 1942, by which he dismissed the appellant's application for an order declaring that Mary Matilda Young is a mentally incompetent person, and for the appointment of himself as committee of her estate.

The appellant is the husband of Mary Matilda Young, and they have lived together at the town of Almonte. Mrs. Young has property of her own, valued in an inventory filed at \$17,956.61. Somewhat over one-half of her estate consists of two deposits in the Bank of Montreal at Almonte, and there are bonds to the face value of \$5,000, besides a house and lot valued at \$1,200, which is rented and brings in an annual revenue of \$324, and some other assets. There are no children and besides the appellant the only near relations are three half-brothers of Mrs. Young.

The appellant is a lumber manufacturer, in a modest way, and is apparently financially able to maintain his wife, and proposes to do so.

Some months ago Mrs. Young exhibited signs of mental disturbance. She is a woman of about 56 years of age, and the physician who had been in the habit of attending her for the past thirty years was called in. He says that he found her suffering from nervous disorder and melancholia, and that in her condition she was entirely unable to conduct any of her affairs, and that she herself required special care. She was also examined by another physician, who found the same condition. She was accordingly removed to the Ontario Hospital at Kingston for care. This application was thereupon made at the Weekly Court at Ottawa on 27th September 1941.

In his reasons for judgment the learned judge says that as to the declaration of mental incompetency the matter is "*res*

judicata", by which I take it that he means that confinement in the mental hospital at Kingston determines the matter. That, I think, with respect, is not so. A declaration by the Court under the provisions of The Mental Incompetency Act, R.S.O. 1937, c. 110, that a person is mentally incompetent is quite a different matter from admitting a person certified to be mentally ill to a mental hospital under The Mental Hospitals Act, R.S.O. 1937, c. 392. The certificates of two medical practitioners in the prescribed form, which suffice for admittance as a certificated patient to a mental hospital under the last-mentioned Act, will not suffice for an application to the Court for a declaration of mental incompetency under The Mental Incompetency Act. In fact on the argument of this appeal the Public Trustee took the objection that the material before the Court is not sufficient to warrant the declaration of mental incompetency that is asked, although beyond question Mrs. Young has been admitted and is now confined as a patient in a mental hospital. This all has its significance on this appeal as serving to mark the broad distinction that exists between the purpose and scope of the two Acts referred to, and the jurisdiction exercised under them in the one case by the Court, and in the other case by the hospital authorities and by the Public Trustee.

It may be that the affidavits and other material filed on the application before Chevrier J. were somewhat scant and hardly fulfilled the well-established requirements of the Court upon an application for a declaration of mental incompetency. It has not been the practice of the Court to make such declarations upon the affidavits of two medical practitioners alone, but to require in addition the evidence of some person or persons, if possible a friend of the afflicted person whose acquaintance has extended over some considerable period, and who is able to swear to facts within his or her own knowledge that will assist the Court in forming some judgment of its own as to the mental condition of the alleged mentally incompetent person. In a proper case an issue will be directed to try the question. The Court also commonly requires to be satisfied that the declaration that is asked is for the benefit of the alleged mentally incompetent person.

I think the material now before us, supplemented as it has been by further affidavits, is sufficient to satisfy the require-

ments. A declaration that Mary Matilda Young is mentally incompetent should therefore be made.

The matter principally dealt with by Chevrier J. in his reasons for judgment, and which formed the principal subject for argument on this appeal, related to the appointment of a committee for the estate of Mary Matilda Young. S. 72 of The Mental Hospitals Act, subject as is otherwise provided in Part VII of the Act, provides that the Public Trustee shall be *ex officio* the committee of the estate of every patient admitted to an institution until he is discharged therefrom. The Public Trustee, promptly on the admission of Mrs. Young, took charge of her estate and has had it under his control ever since. The money on deposit in the Bank at Almonte has been withdrawn and is now invested at 3% per annum. All of this the Public Trustee has ample power to do for s. 80 of The Mental Hospitals Act says that "The Public Trustee as statutory committee of any such patient shall have and may exercise all the rights and powers with regard to the estate of the patient that such patient would have if of full age and of sound and disposing mind." Chevrier J. was of the opinion that there should be no committee of the estate appointed on this application, but that the Public Trustee should continue to act in that capacity.

S. 73 of The Mental Hospitals Act provides that "If prior to or at the time any person is admitted as a patient in an institution the Supreme Court under the authority of *The Mental Incompetency Act* has appointed some person other than the Public Trustee to be the committee of the estate of such person, the Public Trustee shall not in such case be the committee unless he is subsequently appointed as such by the Supreme Court."

S. 74 makes provision for an application by the Public Trustee to the Court to appoint him in the place and stead of a person theretofore appointed by the Court.

S. 76 provides that "If the Supreme Court shall at any time appoint a committee of the estate of any patient under the provisions of *The Mental Incompetency Act* the Public Trustee shall thereupon cease to be committee."

The jurisdiction of the Court in lunacy matters is an old one, derived from various sources, and is now declared and governed by the provisions of The Mental Incompetency Act, R.S.O. 1937,

c. 110. The functions of the Court in providing for the management of the estate of a mentally incompetent person are of a character that a public officer such as the Public Trustee, who has a great many separate funds in his care, requiring for their supervision and management a large staff to whom much of the business must be delegated, would hardly be able to discharge. It has been said that in the management of the estate of the afflicted person, the Court endeavours to supply the place that has been rendered void by his withdrawal. The interest of the mentally incompetent person will be preferred, while he lives, to the interests of family or kindred. The quality of his estate, if possible, will not be changed during the continuance of disability as, on recovery, he may reasonably expect to find his property in the same state as when he became of unsound mind. The Court, in the management of the estate, will adopt reasonable precautions and contract reasonable expense for its maintenance, and, within bounds, its ordinary improvement, but the Court will not speculate with the property. In the appointment of a committee the Court prefers the kin of the mentally incompetent person, if properly qualified, to strangers, and some former acquaintance with the mentally incompetent person and his estate is considered desirable.

The husband of the afflicted wife has, therefore, been recognized as having a strong claim to be appointed committee of her estate under ordinary circumstances. This attitude of the Court towards the management of the estate, and the appointment of a committee for that purpose, has not been affected by the provisions of The Mental Hospitals Act, nor are the powers of the Court in that regard in any way impaired by the provision of s. 72 of that Act providing that the Public Trustee shall, *ex officio*, be the committee of every person admitted to a mental hospital. In fact there has been for many years a statutory provision for an *ex officio* committee of the estate of a patient confined in a mental hospital not unlike this provision of The Mental Hospitals Act (e.g., R.S.O. 1887, c. 245, s. 53). The necessity for some such provision is obvious, but it is equally plain that the Public Trustee, with his wide and uncontrolled powers, was not intended to be substituted generally for a committee appointed by and acting under the supervision of the Court.

In my opinion the jurisdiction vested in the Court is a salutary one and it ought to be exercised. The husband would seem to be a fit and proper person to be appointed committee, but in order that there may be no room for question in the matter, it may be well to refer it to the Local Master to appoint a committee, giving preference to the husband if, in the opinion of the Local Master, he is a fit and proper person. The order should also provide for a reference generally to the Local Master in the manner usual in such cases.

The costs of the applicant should be out of the estate, both of the motion and of the appeal.

Appeal allowed, declaration of mental incompetency made, and reference directed.

Solicitor for the appellant: G. R. McLennan, Almonte.

Solicitor for the Public Trustee, respondent: C. Walker, Toronto.

[HOGG J.]

Coyle v. Sproule.

Patents of Invention — Licensing Agreement — Estoppel of Licensee against Disputing Validity of Patent—Termination of Agreement—Whether Licensee still Estopped—Special Clause in Agreement.

The defendant entered into an agreement whereby he was licensed to use the plaintiff's patent, on payment of a stipulated royalty. The plaintiff later terminated this agreement, as he was entitled to do by its terms, but the defendant continued to manufacture and sell the patented goods. The agreement provided, *inter alia*, that in the event of termination nothing therein contained should release the licensee from the obligation to pay royalties accrued at the date of termination, or relieve him in any way from the position of an infringer if he continued thereafter to use the invention without a new licence. The plaintiff sued for infringement, and the defendant sought to set up the invalidity of the patent as a defence.

Held, this defence could not be permitted. The general principle was well established that a licensee, during the term of the licence, was estopped from denying the validity of the patent. *Crossley v. Dixon* (1863), 10 H.L.C. 293; *Duryea v. Kaufman* (1910), 21 O.L.R. 161; *Ander-son v. E. J. Shepard Ltd.*, 66 O.L.R. 105, [1931] 1 D.L.R. 204, applied. This principle applied to royalties accrued to the date of termination of the agreement, there being no express warranty by the plaintiff of the validity of the patent. Although, after the termination of the agreement, the defendant was not estopped by this principle from disputing the validity of the patent, yet he had expressly covenanted that if he continued to use the patent without a new licence after termination of the agreement, he should be deemed an infringer, thus impliedly recognizing the validity of the patent, and he was therefore precluded by his own agreement from contesting the validity of the patent.

AN action for arrears of royalties under an agreement licensing the defendant to use a patent owned by the plaintiff, and for damages for infringement of the patent after the determination of the agreement by the plaintiff.

13th-16th January 1941. The action was tried by HOGG J. without a jury at Toronto.

R. S. Smart, K.C., and *A. M. LeBel, K.C.*, for the plaintiff.

G. E. Maybee and *R. W. Brownell*, for the defendant.

7th May 1941. HOGG J.:—The plaintiff is the grantee of, and holds, a patent of the Dominion of Canada, No. 370736, dated 21st December 1937, for an alleged new and useful improvement in egg cartons. In this action the plaintiff claims that the defendant has infringed and is infringing this patent, and claims damages and an accounting from the defendant.

The defendant pleads that he has not infringed the plaintiff's patent, alleging that the plaintiff's patent is invalid.

The plaintiff and the defendant entered into an agreement in writing made in the month of February 1938, whereby the plaintiff granted to the defendant the right, licence and privilege to manufacture egg cartons which are the subject of the patent, and to use, sell and deliver the same throughout Canada. A licence fee was to be paid by the defendant on all egg cartons sold pursuant to the agreement at the rate of thirty-five cents per thousand cartons.

In reply the plaintiff pleads that the agreement which has been referred to, by its terms, concludes the defendant from taking the position that he is not an infringer of the patent and estops him from attacking the validity of the said patent.

If the plaintiff's contention, that the defendant by the terms of the licence agreement respecting this patent is now estopped from disputing the validity of the patent, is upheld, the question of whether his patent is valid or not, is not material to the issue in the action.

The agreement and licence aforesaid recites that the plaintiff is the holder of the patent in question for improvements in egg cartons, and further recites that; "whereas the licensee, acknowledging the novelty and utility of the said invention and the validity of the said patent, is desirous of acquiring the right to manufacture and sell under and according to the said patent."

Para. 4 of the agreement and licence reads as follows:

"In case of the refusal or neglect of the Licensee to fulfil the conditions of this agreement for thirty (30) days after having been requested in writing so to do, then, on the serving of a notice in writing on the Licensee, or by leaving it at his place of business, the Licensor may, in thirty (30) days from and after such service of notice, declare this licence to be void, and such licence and agreement shall thereupon be void, but otherwise shall remain in full force and effect to the end of the term for which the said patent is granted, and under all re-issues thereof."

The defendant admits in his statement of defence that he accounted for the royalties or licence fees with respect to the sale of egg cartons made in pursuance of the terms of the said agreement until 31st December 1938, and that since that date he has refused to account and has refused to pay the royalties or licence fees to the plaintiff.

On 27th July 1939, the plaintiff, in a letter to the defendant, terminated the agreement in these words:

"I now give you notice of the termination of this agreement in writing as arranged, and declare that this agreement is null and void.

"I also wish to notify you that under the fifth clause of this agreement you were to render an account and pay the royalty as set forth in clause three of this agreement, viz., 35c. per thousand. This has not been done.

"I therefore notify you that this agreement is null and void thirty days from the above date."

The defendant also admits in evidence that since the termination of the agreement he has manufactured or caused to be manufactured for him, and has sold, egg cartons made according to the plaintiff's invention as set out in the patent granted to the plaintiff as aforesaid.

The licensee of a patent, under agreement with the patentee, so long as he continues to act under the licence, or during the continuation of the agreement, is estopped from disputing the validity of the patent. This estoppel between a patentee and a licensee of a patent is upheld in *Crossley v. Dixon* (1863), 10 H.L.C. 293, and in the comparatively recent case of *Fuel Economy Company, Limited v. Murray*, [1930] 2 Ch. 93.

In our Courts estoppel of this nature was upheld in *Duryea v. Kaufman* (1910), 21 O.L.R. 161; *Gillard v. Watson* (1924), 26 O.W.N. 77, and *Anderson v. E. J. Shepard Ltd.*, 66 O.L.R. 105, [1931] 1 D.L.R. 204, in the Court of Appeal, and in the Exchequer Court of Canada in *The Imperial Supply Company, Limited v. Grand Trunk Railway Company* (1912), 14 Ex. C.R. 88. The licence agreement in question in the present action was terminated by the plaintiff and the estoppel established by the principle above mentioned, ended upon the termination of the licence. The subject is discussed in 13 Halsbury's Laws of England, 2nd ed., at p. 517.

With reference to the claim of the plaintiff for royalties or licence fees from 31st December 1938, to 28th August 1939, when the licence terminated according to the notice given by the plaintiff, royalties for this period must be paid by the defendant, whether the patent is valid or not.

In *Duryea v. Kaufman*, *supra*, in an exhaustive judgment in which the cases on this subject are fully considered by Riddell J., that learned judge, at p. 169, said:

"But, if he [the defendant, the licensee] admits the use under the agreement, unless there be an express or implied warranty of the validity of the patent, or fraud is alleged, it is obvious that the validity of the patent is wholly immaterial—he has promised to pay, and the action is on the promise."

In the present case there is no warranty by the plaintiff of the validity of the patent nor is there any question of fraud.

Although a licensee, during the continuance of the licence, cannot attack the validity of the patent, a stranger might show that the patent was bad. In *Clark v. Adie* (No. 2) (1877), 2 App. Cas. 423, Lord Blackburn said, at p. 436: "Although a stranger might shew the patent was bad as anyone could wish it to be, the licensee must not shew it." This judgment, and that in *Crossley v. Dixon*, *supra*, are referred to at some length by Riddell J. in the *Duryea* case.

Counsel for the plaintiff contended that estoppel against the right of the defendant to seek to establish that the plaintiff's patent was not valid, existed after the termination of the agreement because of the recital to the agreement, above quoted, and the terms of para. 5 of the same document.

The effect of the language of para. 5 of the licence agreement, reserving certain rights to the plaintiff notwithstanding

the provisions of para. 4 and the notice served terminating the agreement and declaring it to be void, touches the root of the question as to whether the defendant is prohibited or estopped from denying the validity of the plaintiff's patent.

Para. 5 of the agreement reads as follows:

"And it is understood and agreed that in case of the termination of this license by reason of notice, served as above, nothing herein contained shall release the Licensee from the obligation to pay the royalty then already accrued at the date of such termination, nor relieve the Licensee in any way from the position of an infringer, if he continues thereafter to use the invention without a new license, which new license it shall be at the option of the Licensor to grant or refuse."

The notice of 27th July 1939, terminating the agreement, merely carries out the provisions of para. 4 of the licence agreement, which declares that the agreement shall be void upon notice being served. The notice cannot therefore have any further or broader effect than can be found in the language of para. 4 of the licence agreement, and the terms of para. 4 are qualified by, and are subject to, the provisions of para. 5, which saves and excepts from the effect of para. 4 and the notice terminating the agreement and declaring the same to be void, a certain obligation still remaining on the shoulders of the defendant notwithstanding the notice of termination of the agreement and the declaration that it is void, namely, that the defendant is to be held as infringing the patent if after termination of the agreement he continues to use the invention without having procured a new licence. This obligation is not, and was not, extinguished or voided by the exercise of the licensor's rights under para. 4, to terminate the agreement.

If this interpretation of the agreement is sound, and my opinion is that the agreement as a whole must be so construed, the question then presents itself whether the defendant, who occupies and has the status of one who infringes the patent, can at the same time maintain that the patent is not valid. I am of opinion that he cannot do so.

Infringement exists if what has been done by the defendant either constitutes the plaintiff's invention or differs from it only colourably. The defendant has admitted that he has manufactured the egg cartons according to the invention described in

the plaintiff's patent, since he ceased to pay royalties to the plaintiff, which he had previously paid during the continuance of the license agreement.

One of the ordinary defences to an action for infringement—and it is the defence in this action—is that the patent which it is claimed the defendant has infringed is not a valid patent and that such being the case, there is, and can be, no infringement. The infringement of a patent of invention presupposes a valid patent to be infringed. In other words, if a person occupies the position of an infringer of a patent such patent must be valid, because an invalid patent cannot be infringed.

The defendant has used and manufactured the invention covered by the plaintiff's patent after the termination of the licence agreement. The defendant agreed with the plaintiff by the provisions of para. 5 of the licence agreement that if he made use of the invention covered by the patent, after the termination of the licence, he was to be held an infringer of the said patent. Only a valid patent is capable of being infringed. The conclusion completing the syllogism, to be deduced from these premises, is that the plaintiff's patent in so far as the defendant is concerned, is valid.

I am therefore of the opinion that the defendant is estopped, or possibly the proper word to be used should be, restrained by the conditions to which he subscribed in para. 5 of the licence agreement, from denying that the plaintiff's patent is a valid patent. The defence that the plaintiff's patent is not valid, is not open to the defendant.

Such being the conclusion at which I have arrived, it is unnecessary to deal with the question of the validity of the plaintiff's patent.

There will be judgment for the plaintiff for:

- (1) An injunction restraining the defendant from manufacturing or causing to be manufactured for him, egg cartons according to the plaintiff's patent, and selling such cartons so manufactured.

- (2) An account to be taken of egg cartons manufactured according to the plaintiff's patent and sold by the defendant from 31st December 1938, to 28th August 1939, and payment to the plaintiff by the defendant of royalties or fees of thirty-five cents per thousand egg cartons sold by the defendant during the said period.

(3) An account of egg cartons manufactured and sold by the defendant subsequent to 28th August 1939.

(4) Damages in the amount of thirty-five cents per thousand of said egg cartons sold by the defendant subsequent to the 28th August 1939.

(5) The costs of the action.

The defendant's counterclaim is dismissed without costs.

Judgment accordingly.

Solicitor for the plaintiff: A. M. LeBel, London.

Solicitor for the defendant: R. W. Brownell, Toronto.

[ROSE C.J.H.C.]

Wasserman v. Sopman et al.

Trades and Trade Unions—Picketing—Extent and Limits of Right—Interlocutory Injunction—The Criminal Code, R.S.C. 1927, c. 36, s. 501, as amended by 1934, c. 47, s. 12.

The mere act of walking up and down in front of business premises and displaying a sandwich-board containing no defamatory or untrue statement is not unlawful *per se*, and will not be restrained by injunction if it does not amount to a nuisance or render necessary the protection of the premises. *Rubenstein v. Kumer et al.*, [1940] O.W.N. 153, 73 C.C.C. 303, [1940] 2 D.L.R. 691, followed; *Canada Dairies Ltd. v. Seggie*, 74 C.C.C. 210, [1940] 4 D.L.R. 725; *Allied Amusements Limited v. Reaney et al.*; *Kershaw Theatres Limited v. Reaney et al.*, 45 Man. R. 371, [1937] 3 W.W.R. 193, 69 C.C.C. 31, [1937] 4 D.L.R. 162; *Sorrell v. Smith*, [1925] A.C. 700, and other authorities, considered.

A motion to continue an interlocutory injunction until the trial of the action, and to enlarge its scope. The facts are fully set out in the judgment.

23rd October 1940. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

R. L. Kellock, K.C., for the plaintiffs.

J. R. Cartwright, K.C., for the defendants.

8th January 1941. ROSE C.J.H.C.:—This is a motion to continue until the trial an interlocutory injunction granted by Kelly J. and to enlarge its scope.

The two plaintiffs, Rosie Wasserman and Fannie Wasserman, are sisters-in-law. They occupy adjoining premises in Elizabeth Street in Toronto, and each (or the husband of each) carries on business on her own premises, as a retail dealer in poultry.

The plaintiffs allege that the defendants, who are four in number, are partners, together with others, in the Toronto Packing Company "which carries on business as packers of poultry and commissioners of poultry" in Toronto; that the defendant Sopman is the President of Toronto Poultry Workers Union, Local 22419; and that the defendant Ungerman is a member of and business agent for the same union. Sopman is in fact the president of the union, but Ungerman says that he is not the union's business agent. The other two defendants, Rosenberg and Greenspan, say that they are not officers or members of the executive of the union, and do not in any way direct or interfere with the union's affairs or activities, but that their activities are solely limited to the sale of poultry to persons who come to the premises of the Toronto Packing Company for the purpose of making purchases. These two, Rosenberg and Greenspan, do not deny, but neither do they admit, the truth of the plaintiffs' allegation that they are partners in the business known as the Toronto Packing Company.

According to the defendant Sopman, the Toronto Packing Company is a "co-operative" organized by the union, and the union itself operates under a charter obtained from the American Federation of Labour at the request of a number of retail poultry dealers, for the purpose of protecting poultry dealers and packers and the public from the activities of the United Packing House Workers of America, Local 115, an affiliate of the Congress of Industrial Organization, commonly known as the C.I.O., "and its attempt to dominate the poultry industry."

The plaintiffs in February 1940, entered into an agreement with the predecessor of the United Packing House Workers of America, Local 115, to "patronize firms and members recognizing the said Union," and afterwards ceased to buy poultry from the Toronto Packing Company, from which formerly they had made some of their purchases. The defendant Sopman says that the acts of which the plaintiffs complain were done "solely for the purpose of furthering the interests of the Toronto Poultry Workers Union," and that no "picketing" has ever been done by that union except "where a breach has occurred of the arrangement," which he says was made with certain poultry dealers in Toronto, including the plaintiffs, "to recognize both unions and not to bow to the demands of the United Packing House Workers of America."

Before the granting of the injunction by Kelly J., there had appeared outside the premises of the plaintiffs a man, not a defendant, but alleged by the plaintiffs to be "the agent or servant of one or the other or of all" the defendants, bearing a sandwich-board upon which were printed, on one side in English and on the other side in Chinese, the words "ON STRIKE", and, under them, the words, "This store is unfair to Toronto Poultry Workers Union, Local 22419, affiliated with A.F. of L."; and later, but still before the injunction, a man bearing a sandwich-board upon which appeared at the top the word "Wasserman's" and underneath, on one side in English and on the other side in Chinese, the words "Unfair to Toronto Poultry Workers Union, Local 22419, affiliated with A.F. of L." The words importing the existence of a strike were quite untrue; the Wassermans have no employees.

The injunction granted by Kelly J. prohibited the defendants and the workmen, servants or agents of each and every of them from publishing, posting, exhibiting, advertising or distributing in, about, upon or in front of, opposite or adjacent to the premises of the plaintiffs any cards, banners, circulars, letters, sandwich-boards or other signs or notices bearing the words that have been set out or words to that effect, and from interfering with any customers of either of the plaintiffs, or with any other person or persons having or seeking to do any lawful business with either of the plaintiffs. Upon the plaintiffs' affidavits standing alone it appears to have been right to restrain an attempt at interference with customers, but upon the whole of the evidence as it stands on the motion before me it is impossible to make a finding that there has been or is likely to be any attempt at such interference. However, neither that question whether interference with customers ought to have been restrained nor the question whether any injunction granted ought to go as against all of the defendants (particularly the defendants Rosenberg and Greenspan) was much discussed before me, because counsel for the defendants said that his clients had no desire to publish of or concerning the plaintiffs any statement that could be deemed libellous (as the statements upon the sandwich-boards might well be) or to interfere with any customer, and he seemed to raise no great objection to the continuance of Kelly J.'s order until the trial, except that he expressed himself as being somewhat fearful of the meaning that might be given to the expres-

sion "words to that effect" used in that order. Therefore, the real controversy with which I am called upon to deal is that arising upon the plaintiffs' motion that the injunction be widened so that the defendants until the trial of the action shall be restrained "from picketing the said places of business of the plaintiffs or either of them, and from marching or parading back and forth in front of or about" such places of business "for the purpose of persuading or otherwise preventing persons from entering same or for any other purpose". The defendants say that it is desired to cause a man, by sandwich-board or other sign, to give notice that the plaintiffs refuse to deal with the Toronto Packing Company, and they strenuously oppose the granting of any injunction that would have the effect of restraining Toronto Poultry Workers Union, Local 22419, or Toronto Packing Company, or persons acting in the interests of either, from conveying to customers or prospective customers of the plaintiffs information (without any comment upon it or suggestion as to what course the persons whom it reaches should pursue) of the plaintiffs' refusal to deal with the Toronto Packing Company.

The cases in which trade unions or other associations of persons attempt to advance their trade interests by exercising the kind of pressure that the defendants, or some of the defendants, and their associates desire to exercise in this instance are becoming numerous, and it was said by counsel on the argument of the present motion that a number of actions had been begun or were in contemplation in which the question of the right so to proceed in the contest which apparently is under way between the two rival unions is or will be brought in question. In the circumstances it appears to be desirable that an authoritative statement of the law should be obtained from the Court of Appeal, and I suggested to counsel the advisability of dropping the present motion and of arranging for a very speedy trial of this action, in which a judgment would be pronounced from which there would be an unrestricted right of appeal and not merely the limited right that there is to appeal from an interlocutory order. Counsel, however, did not seem to be inclined to adopt my suggestion, and the argument proceeded and there was a discussion of the relevant authorities, including, of course, *J. Lyons & Sons v. Wilkins*, [1896] 1 Ch. 811 and [1899] 1 Ch. 255; *Allen v. Flood and Taylor*, [1898] A.C. 1; *Quinn v.*

Leathem, [1901] A.C. 495; *Sorrell v. Smith*, [1925] A.C. 700, and also of the question of the bearing of s. 501 of The Criminal Code, R.S.C. 1927, c. 36, with the addition made by 1934 (Dom.), c. 47, s. 12, and in this connection were considered the judgments of the Court of Appeal for Manitoba in *Allied Amusements Limited v. Reaney et al.*; *Kershaw Theatres Limited v. Reaney et al.*, [1937] 4 D.L.R. 162, 45 Man. R. 371, [1937] 3 W.W.R. 193, 69 C.C.C. 31, and *Hurtig v. Reiss et al.*, [1937] 4 D.L.R. 433, 45 Man. R. 520, [1937] 3 W.W.R. at 558, 69 C.C.C. 101.

I have considered the authorities discussed by counsel, but I have come to the conclusion that I ought not to attempt, upon this interlocutory motion, any analysis of the cases or any extended statement of my own opinion, but ought to follow the recent judgment of Roach J. in *Rubenstein v. Kumer et al.*, [1940] O.W.N. 153, 73 C.C.C. 303, [1940] 2 D.L.R. 691, which, I think, cannot successfully be distinguished, and the still more recent judgment of Mackay J., pronounced after a trial, in *Canada Dairies Ltd. v. Seggie*, [1940] 4 D.L.R. 725, 74 C.C.C. 210.

In *Rubenstein v. Kumer* the plaintiff had refused to execute an agreement with the Associated Poultry Buyers Union, which union, according to the affidavit of Izzy Wasserman filed in the present case, has been succeeded by the United Packing House Workers of America, Local 115. That agreement is set out in full in the judgment of Roach J., and I suppose it is the agreement which the Wassermans have signed. At any rate, it is an agreement "to patronize firms and members recognizing the said" United Packing House Workers of America, Local 115, which is what Wasserman says that the plaintiffs in the present case have agreed to do. The defendants in *Rubenstein v. Kumer* threatened (to quote Roach J.) "to commence to picket the plaintiff's business premises, exhibiting a sign in the words following: 'Harry Rubenstein, Export Packers, does not recognize the Associated Poultry Buyers Union of Toronto.'" Roach J. held this statement was not defamatory—it was true, as is the statement which the defendants in the present case are desirous of making,—that the making of it on the sign did not amount to a nuisance, and that the acts werè not such as to render necessary the protection of property; and therefore that the motion to continue the injunction must be refused. He did

enjoin the defendants from threatening to interfere or interfering with the plaintiff in the use and enjoyment of his property so as to amount to a nuisance, and from threatening to interfere or interfering with any personal property used by the plaintiff in connection with his business, and from threatening, intimidating or otherwise interfering with any employees of the plaintiff; but that has nothing to do with the question whether the mere walking back and forth in front of the plaintiff's premises with the sign was something that ought to be restrained.

Roach J. discussed the question whether the agreement which Rubenstein was asked to sign was unlawful as contravening s. 498 of The Criminal Code, which relates to combinations in restraint of trade; and he thought that if the attempt to induce Rubenstein to enter into the agreement was an attempt to commit an indictable offence, Rubenstein's protection was to be found in a proceeding by indictment, rather than in a civil proceeding, founding himself in this regard upon the statement of Middleton J.A. in *Robinson v. Adams*, 56 O.L.R. 217, [1925] 1 D.L.R. 359. Counsel for the plaintiffs in the present case contends that there was error in this particular holding, as well as in reading too narrowly the expression "unless a right to property is affected" used by Middleton J.A. But whether Roach J. was right or wrong, he did decide that the carrying of the sign on which was made the perfectly true statement that Rubenstein did not recognize the union did not create a nuisance, and that no interference by the Court for the protection of the plaintiff or his property was justified, and I cannot see how in the present case it is open to me, in the face of his judgment, to say that the peaceable exhibition of the sign which the defendants, unless restrained, are likely to exhibit is something that ought to be restrained by interlocutory injunction, there being, on the material before me, no reason to suppose that the so-called "picketing" will cause crowds to gather in front of the plaintiffs' premises, or will in any way obstruct access to the plaintiffs' premises by persons who desire to do business with the plaintiffs, or that the defendants—I am using the word "defendants" as meaning such of the defendants as actually will be concerned in directing whatever proceedings are taken—are actuated by any desire to punish the Wassermans for anything that has been done, or by any desire other than a desire to promote the defendants' own business interests by persuading, inducing or,

if one uses the word of s. 501 of The Criminal Code, "compelling" the Wassermans to be customers of the defendants, and there is no need to discuss either the question that would arise if proof of an intention so to punish the Wassermans were forthcoming, or the question whether the communication of truthful information by the exhibition of the sign is, regard being had to s. 501 (g) of The Criminal Code, a besetting of the premises within the meaning of s. 501 (f).

It is contended by counsel for the plaintiffs that the judgment of Mackay J. is to be distinguished from the present case by the fact that in *Canada Dairies Ltd. v. Seggie*, *supra*, there was a single defendant, so that the question of conspiracy to injure the plaintiffs did not arise, whereas in the present case it appears that whatever the defendants are doing or are likely to do is being done or will be done by the actors in combination with others. That may be so, and it may be that if I came to the conclusion that, because they are acting in concert, the defendants are committing an actionable wrong, I should, notwithstanding that judgment, be free to give effect to my own opinion and to grant the injunction. But however that may be, *Rubenstein v. Kumer*, as I have said, is in my opinion indistinguishable from the present case.

It is not to be inferred that in basing my judgment upon the fact that the question that I am called upon to decide has already been decided in *Rubenstein v. Kumer* I am suggesting that I should have decided that case differently. On the contrary, as at present advised, I think that the difficulties in the way of another disposition either of that case or of *Canada Dairies Ltd. v. Seggie* would have been very formidable, even if in the latter case it had been proved (as I imagine the fact was) that the defendant was acting in combination with others whose interests were the same as his, or merely as the agent of others who were acting in concert for the protection of what they deemed to be their own trade interests and against whom no malicious desire to injure the plaintiff was proved. And even if those cases were out of the way there would be the same difficulties in the plaintiffs' way on the present motion. If the case is founded upon the combination or conspiracy one is met by such statements as that of Lord Buckmaster in *Sorrell v. Smith*, [1925] A.C. 700 at p. 748, that "It is true that an act lawfully

done by one may be illegal when two or more combine for its execution, but it does not follow that all acts done in combination which inflict injury on third parties are unlawful, even though that injury is the means contemplated to achieve the purpose of the combination"; and one must observe that Lord Buckmaster would not say "that a combination deliberately interfering with a man's trade was illegal per se, but could be justified if the purpose of the interference was to promote the trade interest of the combination", but that he would "prefer in reaching the same goal to tread another path and to say that a combination having such a purpose was not illegal without malice, and that the onus is not on the defendant to justify but on the plaintiff to prove that the act was spiteful and malicious"; and if the case is put not on the combination but on the contention that the act of walking back and forth in front of the plaintiffs' premises with the sign is a tort, one is met by such statements as that of Trueman J.A. in *Allied Amusements Limited v. Reaney*, *supra*, that s. 501 of The Criminal Code states the common law, and that s. 501(g) is a proviso inserted *ex abundanti cautela*.

Perhaps it is to be regretted that the Court, upon such evidence as is before me upon this motion, cannot intervene promptly to protect a peaceably inclined trader from the kind of annoyance and possible loss of trade to which the Wassermans are likely to be subjected, but, for the reasons that have been stated, I think that I cannot make the extended order for which the plaintiffs move.

The injunction granted by Kelly J. will be continued until the trial—I do not think it is necessary to delete the words of which Mr. Cartwright is afraid—but the scope of that injunction will not be enlarged. The costs will be costs in the cause unless otherwise ordered by the trial judge.

Order accordingly.

Solicitor for the plaintiffs: H. Max Swartz, Toronto.

Solicitor for the defendants: David B. Goodman, Toronto.

[COURT OF APPEAL.]

Montreal Trust Company v. Abitibi Power & Paper Company Limited.

Courts—Appeals to Privy Council—Motion to Admit Appeal—Importance of Matters Involved—Interlocutory Orders—The Privy Council Appeals Act, R.S.O. 1937, c. 98.

Constitutional Law—Validity of Provincial Statute Granting Right of Appeal, without Security, to One Party in Particular Litigation—Attempt to Deprive Court of Jurisdiction—The Abitibi Moratorium Constitutional Question Act, 1942 (Ont.), c. 2.

There is nothing in any of the proclamations or statutes, culminating in The Privy Council Appeals Act, R.S.O. 1937, c. 98, dealing with the right of appeal to the Privy Council, which limits that right of appeal to final orders, and an appeal may be admitted, in proper circumstances, from an interlocutory order.

The Abitibi Moratorium Constitutional Question Act, 1942 (Ont.), c. 2, whereby the Provincial Legislature granted to one party, an insolvent company, the right to appeal from a judgment of the Court of Appeal directing a sale of its assets, is *ultra vires*, not falling within the head "administration of justice in the Province" in s. 92(14) of The B.N.A. Act. It purports to deprive the Provincial Court of all judicial function, and to require it to perform the merely clerical task of transmitting the case to the Judicial Committee for its opinion.

The defendant company's motion to admit its appeal to the Judicial Committee from the dismissal of an appeal from an order for the sale of the assets of the company was allowed, and the appeal was admitted, under The Privy Council Appeals Act, and upon the terms set forth in that statute.

AN application by the defendant company to admit its appeal to the Judicial Committee of the Privy Council from the judgment herein, reported in [1942] O.R. 183, [1942] 2 D.L.R. 349. The facts, and the previous history of the litigation, are fully set out in the judgments now reported.

10th, 13th, 16th and 17th April 1942. The motion was heard by ROBERTSON C.J.O. and MASTEN and McTAGUE JJ.A.

D. L. McCarthy, K.C., for the defendant company, applicant: The application is based on rights given us by The Abitibi Moratorium Constitutional Question Act, 1942 (Ont.), c. 2, s. 1, subs. 2 of which makes applicable s. 8 of The Constitutional Questions Act, R.S.O. 1937, c. 130.

The right of appeal to the Privy Council is not given by The Privy Council Appeals Act, R.S.O. 1937, c. 98, but is found in the Royal Proclamation of 7th October 1763: *McBride v. Ontario Jockey Club Ltd.*, 58 O.L.R. 267, [1926] 1 D.L.R. 743; *Patton et al. v. Yukon Consolidated Gold Corporation Limited et al.*, [1942] O.R. 92, [1942] 2 D.L.R. 301; Kennedy's Statutes,

Treaties, and Documents of the Canadian Constitution, 2nd ed. p. 35.

S. 12 of The Privy Council Appeals Act is enacted under the power vested in the Ontario Legislature by virtue of the proclamation.

The Abitibi Moratorium Constitutional Question Act, 1942, provides the terms of the appeal, which are subject to the directions of the Court as exercised in the case of *Patton v. Yukon Consolidated Gold Corporation Limited*, *supra*. The Court still has jurisdiction to admit or refuse to admit the appeal. The 1942 Act only sets forth the conditions of appeal: *Nadan v. The King*, [1926] A.C. 482 at 491; *Davis et al. v. Shaughnessy et al.*, [1932] A.C. 106 at p. 111; *British Coal Corporation et al. v. The King*, [1935] A.C. 500 at 510; *Reference re Supreme Court Act Amendment Act*, [1940] S.C.R. 49 at 65, [1940] 1 D.L.R. 289 (*sub nom. Reference re Privy Council Appeals*).

The 1942 Act does not deprive the Court of jurisdiction. If there is an abuse of process of the Court, the Court has a jurisdiction which may be exercised, as it was in *Patton v. Yukon Consolidated Gold Corporation Limited*, *supra*.

The word "sentence" in the proclamation covers any judgment or decision of the Courts; Murray's New English Dictionary, Vol. 8, p. 468.

The appeal is from a final judgment or order, and not from an interlocutory order: *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580; Holmsted & Langton's Ontario Judicature Act, 5th ed. p. 152.

If this proposed appeal is from a final judgment, then it is directly within the terms of the proclamation of 1763. Even if it is an interlocutory order, the appeal should be admitted, as the questions involved are of great general and public importance; Bentwich, Privy Council Practice, 3rd ed., p. 103. [ROBERTSON C.J.O.: It is not good practice to admit appeals to the Privy Council from interlocutory orders: *Benoy Krishna Mukherjee v. Satish Chandra Giri* (1927), L.R. 55 Ind. App. 131 at p. 134.]

The Court has a discretion and it should be exercised in admitting this appeal.

A. M. Stewart, K.C., for the Attorney-General of Ontario: The 1942 Act is a proper exercise of the powers of the Legislature. The Provincial Legislature cannot affect the jurisdiction of the Privy Council: *Nadan v. The King*, [1926] A.C. 482; *British Coal Corporation et al. v. The King*, [1935] A.C. 500; *Reference re Supreme Court Act Amendment Act*, [1940] S.C.R. 49, [1940] 1 D.L.R. 289.

Under various Imperial enactments, power is conferred on colonial authorities to provide for what is called the appeal as of right. It is a power to determine under what circumstances the subject may go to the Privy Council as of right; Safford & Wheeler, *Privy Council Practice*, p. 363; *McBride v. Ontario Jockey Club Ltd.*, 58 O.L.R. 267 at 268, [1926] 1 D.L.R. 743; *Reference re Supreme Court Act Amendment Act*, *supra*, at pp. 67-68 (a clear analysis of the scheme, whereby Provinces have jurisdiction as to the circumstances of admitting an appeal to the Privy Council).

As part of the scheme, and in pursuance of the proclamation of 1763, the Provincial Legislature passed The Privy Council Appeals Act, now R.S.O. 1937, c. 98, The Constitutional Questions Act, now R.S.O. 1937, c. 130, and the 1942 Act. The latter Act, with which we are dealing, is enabling legislation. It removes some of the restrictions set out in The Privy Council Appeals Act: *Patton et al. v. Yukon Consolidated Gold Corporation Limited*, [1942] O.R. 92 at 100, [1942] 2 D.L.R. 301.

"Sentence" in the proclamation does not exclude an interlocutory order. That word is used in Imperial enactments relating to the Privy Council—3 & 4 Wm. IV, c. 41 (1833), and 7 & 8 Vict. c. 69 (1844). Note the collocation of the word in the 1833 Act ("determination, sentence, rule or order") and in that of 1844 ("judgments, sentences, decrees, or orders"); Bentwich, *Privy Council Practice*, 3rd ed. pp. 277, 290.

The adjective "final" could have been added if such a restriction had been intended: *Chung Chuck v. The King*, [1930] A.C. 244 at 252; *Esnouf v. Attorney-General for Jersey* (1883), 8 App. Cas. 304; *Renouf v. Attorney-General for Jersey*, [1936] A.C. 445; *Salisbury Gold Mining Company, Limited v. Hathorn et al.*, [1897] A.C. 268.

The word "definitive" is sometimes used to denote the finality of a judgment or order. The term "interlocutory" is added

when required, and therefore the word "sentence" standing alone does not exclude appeals from interlocutory decrees; Safford & Wheeler, *Privy Council Practice*, pp. 387, 587; *Goldring v. La Banque d'Hochelaga* (1880), 5 App. Cas. 371 at 372.

If there is any doubt as to the power conferred by the proclamation of 1763, that doubt is removed by The Constitutional Act, 1791, s. 34; Kennedy, *op. cit.* p. 200.

The terms of s. 1 of the 1942 Act are similar to s. 1 of The Privy Council Appeals Act and must be understood as the words in the latter Act have been interpreted: *Reference re Supreme Court Act Amendment Act, supra*.

Cushing v. Dupuy (1880), 5 App. Cas. 409 does not apply. That was a proceeding in bankruptcy. The Winding-Up Act, R.S.C. 1927, c. 213, does not say the judgment of the Court of Appeal shall be final.

The Court has inherent jurisdiction and is bound to exercise that jurisdiction: *Davis et al. v. Shaughnessy et al.*, [1932] A.C. 106 (headnote).

The part of the 1942 Act eliminating the giving of security is similar to s. 12 of The Privy Council Appeals Act, which was upheld in *Beauharnois Light, Heat & Power Co. Ltd. et al. v. The Hydro-Electric Power Commission of Ontario et al.*, [1937] O.R. 796, [1937] 3 D.L.R. 458.

C. R. Magone, K.C., for the Attorney-General of Ontario: The judgment of Middleton J.A., directing a sale, is a final judgment. A foreclosure judgment has been held to be final: *Smith v. Davies* (1886), 31 Ch. D. 595. A judgment may be interlocutory in form, having regard to the main action, and yet be final in its effect upon the rights of the parties: Cameron, *Supreme Court Practice and Rules*, 3rd ed., p. 29; *Macfarlane et al. v. Leclaire et al.* (1862), 15 Moo. P.C. 181.

Any limitations under the proclamation of 1763 were swept away by The Constitutional Act, 1791; Kennedy, *op. cit.* p. 194. The first step after the proclamation of 1763 is The Quebec Act, 1774, s. 4; Kennedy, *op. cit.* p. 138. The Quebec Act makes no provision for appeals to the Privy Council. Thereafter, by the Instructions to Governor Carleton, 1775, an appeal to the Privy Council was directed to be admitted when the amount involved exceeded £500; Kennedy, *op. cit.* p. 157. The next step is an Ordinance for Establishing Courts of Civil Judicature in

the Province of Quebec, 1777, s. 5; Kennedy, *op. cit.* p. 162. The Constitutional Act, 1791, provides by s. 33 for the continuing in force of present laws, subject to repeal or variation by the Legislative Councils; and by s. 34 any additional provisions may be made by the Legislative Councils; Kennedy, *op. cit.* p. 200. By this enactment, the Provincial Legislatures received broad powers relating to appeals: *Reference re Supreme Court Act Amendment Act*, [1940] S.C.R. 49 at 67, [1940] 1 D.L.R. 289.

A. G. Slaght, K.C., for the Preference Shareholders' Protective Committee: I adopt the arguments presented for the applicant and the Attorney-General. In *Benoy Krishna Mukherjee v. Satish Chandra Giri* (1927), L.R. 55 Ind. App. 131, Viscount Sumner at p. 134 says interlocutory orders are not a suitable subject for review "in the absence of special circumstances or some unusual occasion." There are unusual circumstances in the present case; see the Report of the Royal Commission, pp. 5, 7, 10, 14, 17, 20. If a sale is allowed, it amounts to a foreclosure. There are many shareholders in the British Isles and the United States who would be unable to bid successfully at the sale, as they could not transfer funds to Ontario to finance the purchase. The only people who can buy the assets are the bondholders, who will merely deposit their bonds for the purchase price. The war is a very special circumstance which the Court should consider. The Court of Appeal waived aside consideration of special circumstances when the appeal was argued and in the judgments of the Court.

There has been no procrastination on the part of the shareholders. Although the writ was issued in 1932, it is only now, when the Company is prosperous, that the bondholders seek to effect a foreclosure.

W. Judson, for the common shareholders' protective committee, and J. L. Stewart, for the general creditors' protective committee, adopted the arguments already presented.

W. N. Tilley, K.C. (R. W. S. Johnston with him), for the respondent: If the Court has discretion, we must consider the industry in question. Newsprint industry is fluctuating. The Privy Council will not have better knowledge than the Ontario Court of Appeal of the local conditions. Due to war regulations, newsprint may be a drug on the market at any time. The company has been in receivership for 10 years.

Although the Privy Council has the broadest powers, it does not consider that interlocutory matters should be brought before it as a general course; *Benoy Krishna Mukherjee v. Satish Chandra Giri* (1927), L.R. 55 Ind. App. 131; *Maharajah Moheshur Sing v. The Bengal Government* (1859), 7 Moo. Ind. App. 283 at 302; *Forbes v. Ameeroonissa Begum* (1865), 10 Moo. Ind. App. 340 at 359; *Sheonath v. Ramnath* (1865), 10 Moo. Ind. App. 413 at 423.

The constitution of the Judicial Committee of the Privy Council is dealt with in *Alexander E. Hull & Co. v. McKenna*, [1926] I.R. 402.

An order for working out the rights of the parties is interlocutory: *Norton v. Norton* (1908), 99 L.T.R. 709, approving *Blakey v. Latham* (1889), 43 Ch. D. 23.

The Ontario Legislature cannot pass *ultra vires* legislation interfering with Court proceedings, and then pass an Act directing that an appeal must be admitted to the Privy Council.

In the proclamation of 1763, general expressions are used; Kennedy, *op. cit.* p. 36. It states that appeals shall be subject to "the usual limitations and restrictions", and does not refer to the prerogative right of the Sovereign. Governor Murray's Instructions of 1763 (Kennedy, *op. cit.* p. 46) provide for the setting up of Courts. The appeal to the Privy Council is given by the Ordinance Establishing Civil Courts, 1764, Kennedy, *op. cit.* p. 53, but it is a limited right of appeal. It is limited to appeals from a Court of appeal where the matter in contest involves a value of £500 or more. The proclamation of 1763 is an assurance to the people, and the ordinance of 1764 implements the promise by directing the setting up of Courts. The word "contest" contemplates a final judgment, not an interlocutory matter. By an ordinance of 1766, the ordinance of 1764 was amended and declared to be temporary.

By the Quebec Act, 1774, s. 4—Kennedy, *op. cit.* p. 138, the proclamation and ordinances made thereunder are revoked. Courts and their powers are later provided by an Ordinance establishing Courts of Civil Judicature, in the Province of Quebec, ss. 4, 5; Kennedy, *op. cit.* p. 162. The appeal to the Privy Council is given in certain specific cases, and the subject has not the right of appeal in any matter. In The Constitutional Act, 1791, ss. 33-34, it is stated that earlier ordinances shall

continue in force, with changes to be made by the Legislature of the Province; Kennedy, *op. cit.* p. 200.

With that background, and within the rights reserved to the Provincial Legislatures by The Constitutional Act, an Act was passed by the Province of Upper Canada in 1794, 34 Geo. III, c. 2, s. 36 of which is the foundation of the present Privy Council Appeals Act. By that section, the judgment of the Court of Appeal is made final except in certain cases.

The Union Act, 1840, providing for the re-uniting of the Provinces of Upper and Lower Canada should next be considered, with particular reference to ss. 44, 46-47, Kennedy, *op. cit.* p. 442. The Parliament of Canada passed an Act Regulating the Administration of Justice in Upper Canada—12 Vict. c. 63. S. 46 of this Act sets out the provisions for appeals to the Privy Council. Before Confederation, the right of appeal was established, and is found in C.S.C. 1859, c. 13, ss. 57-63. After Confederation it is set out in The Court of Appeal Act, R.S.O. 1877, c. 38, ss. 49-54. The provision that the Court of Appeal judgment shall be final is dropped, but only because of the existence of another appellate Court. It has always been from a final judgment that an appeal lies to the Privy Council.

Under The British North America Act, 1867, no permission was given to the Provincial Legislatures to alter or amend the right of appeal to the Privy Council. It is not a question of restrictions, but of creative power. There is no Imperial authority that enables a Provincial Legislature to say an appeal shall lie as of right to the Privy Council.

[McTAGUE J.A.: Does s. 129 of The British North America Act provide that legislation affecting the Courts shall be stayed? The 1833 Act relating to the Privy Council appears to include broad jurisdiction, and if so, why cannot the Province legislate with respect to its own subjects in appeals, in conformity with the 1833 Act?]

Note the language at the end of s. 129. The 1833 Act gives wide powers to the Judicial Committee, but does not enable Provincial Legislatures to grant a right of appeal in all the matters included in those powers. The authority of the Ontario Legislature must be found elsewhere in the B.N.A. Act.

Goldring v. La Banque d'Hochelaga (1880), 5 App. Cas. 371 can be distinguished as a decision on the particular wording of a

statute of the Province of Quebec. The headnote in *E. W. Gillett & Co. Limited v. Lumsden*, [1905] A.C. 601 is misleading. It was considered and explained in *Davis et al. v. Shaughnessy et al.*, [1932] A.C. 106 at 111. The Privy Council Appeals Act cannot be disregarded; *Lovibond v. Grand Trunk Railway Company of Canada et al.*, [1936] 2 All E.R. 495 at 507. The same Act is referred to in *Beauharnois Light, Heat & Power Co. Ltd. et al. v. The Hydro-Electric Power Commission of Ontario et al.*, [1937] O.R. 847 at 853, [1937] 4 D.L.R. 225.

The Province may have had jurisdiction before the B.N.A. Act to determine what appeals may go to the Privy Council, but not since that Act. The Dominion has the broad power given by s. 101 of the B.N.A. Act, which extends to and includes s. 129. It may pass an Act prohibiting an appeal to the Privy Council, but the Provincial Legislature has not that power.

The Privy Council is not a Provincial Court; *Reference re Supreme Court Act Amendment Act*, [1940] S.C.R. 49 at 56, [1940] 1 D.L.R. 289. At p. 58 the legislative powers of the Provinces are defined. At p. 61, s. 101 of the B.N.A. Act is considered. The Provincial Legislature has no power to deal with the matter of appeals to the Privy Council: *Reference re Supreme Court Act Amendment Act*, *supra* at pp. 72, 73, 107, 128.

It would be far-reaching if every time a constitutional question was raised, the Legislature could move to have the litigation carried on, even if parties did not wish to do so. The 1942 Act gives a right of appeal to an insolvent company, without the necessity for giving security, when no appeal lies as of right.

R. C. H. Cassels, K.C. (*D. G. Guest* with him), for the individual defendants, adopted this argument.

A. M. Stewart, K.C., in reply: The Province has the right to state the procedural requirements for an appeal as of right to the Privy Council. The Proclamation of 1763 had the effect of a statute: *Kennedy, op. cit.* p. 93. Power to legislate with respect to the Privy Council has continued, and there was no break at Confederation; *Re Boulton et al. and The Toronto Terminals Railway Co. Ltd.*, [1933] O.R. 816 at 822, [1933] 4 D.L.R. 621. The right of appeal was given in equity cases by 7 Wm. IV (1837) c. 2, s. 16, which is a definite alteration in the area of the appeal as of right. A further enlargement in the area came with The Constitutional Questions Act, 1890 (Ont.),

c. 13, the validity of which has not been challenged, and on which the Privy Council has acted. Note that it was passed after the B.N.A. Act. The powers of the Provincial Legislature respecting appeals to the Privy Council come under the heading of procedure. *Reference re Supreme Court Act Amendment Act, supra*, at p. 68; *British Coal Corporation et al. v. The King*, [1935] A.C. 500 at 520-21. The right of the Province is found in s. 92(14) of The British North America Act, 1867. The pith and substance of the 1942 Act is to give the litigant an opportunity of having the matter determined by the Privy Council. It is true that a stay of proceedings will result, but that is not the reason for the Act.

Cur. adv. vult.

28th April 1942. ROBERTSON C.J.O.:—This is an application to admit an appeal to the Judicial Committee of the Privy Council from the order of the Court of Appeal dated 21st March 1942, which dismissed an appeal from an order of Middleton J.A. dated 4th December 1941, whereby he ordered that all the real and personal property, assets and effects of the defendant company be sold under the direction of the Master by public auction, subject to a reserve bid. The sale directed is for the purpose of carrying out the judgment in this action, dated 3rd November 1937, after the trial of the action, which declared that the plaintiff and the holders of bonds of the defendant company issued under an indenture and mortgage dated as of 1st June 1928, are entitled to a first charge upon the undertaking, property and assets of the defendant company for payment of the moneys secured thereby, and that the trusts of the said indenture and mortgage ought to be performed and carried into execution, and did order and adjudge the same accordingly.

The defendant company was incorporated on 9th February 1914 by Letters Patent of the Dominion of Canada, and took over at that time the undertaking and assets of Abitibi Pulp & Paper Co. Ltd. In 1928 the defendant company acquired the assets of several other companies, and its capital structure was altered and the bond mortgage in question in this action was made. Early in September 1932, default having been made in the payment of interest on the bonds, this action was commenced and

a receiver was appointed. There were bonds and shares of the defendant company outstanding as follows:—

First mortgage bonds secured by the mortgage of 1st June 1928	\$48,267,000.00
10,000 shares of 7% cumulative preferred stock	1,000,000.00
348,818 shares of 6% cumulative preferred stock	34,818,000.00
1,088,117 common shares having no par value but a book value of	18,964,935.43
There were also claims of unsecured creditors to the amount of	757,611.00

On 26th September 1932 the defendant company was declared bankrupt and on the same day, leave having been obtained in the bankruptcy proceeding, an order was made for winding up the company under the provisions of The Winding-up Act, R.S.C. 1927, c. 213, and a liquidator was appointed. Somewhat later the plaintiffs obtained leave in the winding-up to proceed with this action notwithstanding the winding-up order.

The property of the defendant company is still in the hands of the receiver appointed in this action, who has carried on the business of the company throughout his receivership. In the earlier years of the receivership the operation of the company was not profitable, but in more recent years, owing in part to an increase in the market price of newsprint, there has been a marked improvement. By order dated 7th June 1941 the receiver was directed to pay to the plaintiff the sum of \$6,274,710 for distribution *pro rata* among the bondholders on account of principal moneys due on the bonds. An order has lately been made for the payment of a further sum to be similarly applied. No interest, however, has been paid upon the bonds during the receivership.

Attempts were made following the judgment entered after the trial of the action in 1937, to carry out a sale of the mortgage property for a consideration other than cash, under the provisions of s. 15(i) of The Judicature Act, R.S.O. 1937, c. 100. The proposals that were submitted to the Court for its order and approval included, as an essential part of them, provisions for the distribution of the consideration to be received, not only among the bondholders, but among unsecured

creditors and shareholders of the several classes upon a specified basis. The proposals had the sanction of the majority of the bondholders, but the Court was of the opinion that it was not within its power to order the carrying out of the proposed sale, involving as it did the distribution of the assets of the company in liquidation otherwise than under The Winding-up Act. In the end nothing came of these attempts.

By order of Middleton J.A. of 10th June 1940 it was ordered, on the plaintiff's application, that the mortgaged property of the defendant company be sold under the direction of the Master, and that the purchase money be paid into Court. Bondholders were given leave to bid at the sale and to become purchasers, and there were reserved to them all powers and privileges conferred by the bond mortgage, including the rights and privileges conferred by para. 34 of the mortgage. Under para. 34 a purchaser, on a sale of the mortgaged premises, is entitled to turn in bonds or matured coupons in place of cash on account of the purchase price, to the amount which would, upon distribution of the net proceeds of the sale, be payable thereon. Only one bid was made when the property was offered for sale by the Master under this order. That bid was made by Mr. H. J. Symington, who is chairman of a committee said to represent the holders of approximately sixty per cent. of the outstanding bonds. The amount bid was \$30,000,000 and as this was less than the reserve bid fixed by the Master, no sale was made. A motion was then made for an order that the property be offered for sale without a reserve bid. This motion came on before Middleton J.A. on 29th November 1940, when it was adjourned *sine die* with leave to any party to bring the motion on at any time upon one week's notice. The motion was not brought on again until November 1941. In the meantime an Act of the Legislature of the Province of Ontario entitled "An Act respecting a certain Bond Mortgage made by the Abitibi Power & Paper Company Limited to the Montreal Trust Company", and being c. 1 of 5 Geo. VI, was passed and assented to on 9th April 1941. The validity of this statute was one of the principal matters considered by the Court of Appeal in making its order, from which an appeal to the Judicial Committee is now sought to be admitted.

By the statute referred to it is enacted that in so far as any property, real or personal, in Ontario is concerned, no fur-

ther proceedings shall be taken or continued under the order made by Middleton J.A. on 10th June 1940, directing the sale of the defendant company's undertaking, property and assets under the mortgage made by the plaintiff as trustee for bondholders. It is further enacted that no further step shall be taken or order made in this action without the consent in writing of the Attorney-General. The Act provides that it shall come into force on a day to be named by the Lieutenant-Governor by proclamation, and when so proclaimed the Lieutenant-Governor in Council may, at any time, terminate the operation of this Act, but, subject to the operation of any order-in-council terminating its operation, the Act shall remain in force until 31st December 1942.

There had been no proclamation of the Lieutenant-Governor bringing this statute into operation at the time notice was given that the motion before Middleton J.A. would be brought on again in November 1941, but before the motion was disposed of a proclamation was issued bringing the Act into force. Middleton J.A., however, held that the Act was *ultra vires* of the Ontario Legislature for reasons stated by him in writing, and on 4th December 1941 he made an order that the mortgaged property be sold on 18th February 1942 under the direction of the Master, subject to a reserve bid. By leave granted by Roach J., an appeal from this order was taken in the name of the company by the liquidator, to the Court of Appeal. The appeal was heard by a Court composed of Riddell, Fisher, Henderson and Gillanders JJ.A. and Hogg J., and on 21st March 1942 the appeal was dismissed, Gillanders J.A. dissenting. The majority of the judges of the Court of Appeal were of the opinion that the Act of the Legislature of 1941, already referred to, was *ultra vires*.

The Legislature thereupon passed an Act entitled "The Abitibi Moratorium Constitutional Question Act, 1942", c. 2, which was assented to on 27th March 1942. This Act in its preamble refers to the order of Middleton J.A. of 4th December 1941, ordering a sale under the mortgage, and to the judgment of the Court of Appeal of 21st March 1942 dismissing the defendant company's appeal from that order, and to the fact that in these proceedings the constitutional validity of The Abitibi Power & Paper Company Limited Moratorium Act, 1941 (Ont.), c. 1, was brought in question, and that the Act was held to be invalid. It is further recited that pursuant to the provisions of s. 32 of

The Judicature Act, notice was duly given to the Attorney-General that the constitutional validity of the last-mentioned Act would be brought in question in the said proceedings, and that the Attorney-General, personally and by counsel, appeared in the said proceedings, but that neither the Attorney-General nor His Majesty in right of the Province of Ontario was or is formally a party to the said action, and that it is desirable that the question of the constitutional validity of the said Act be passed upon by the Court of last resort. It was therefore enacted that:

"1.—(1) Notwithstanding anything contained in *The Privy Council Appeals Act*, *The Judicature Act* or any other Act or any rules or regulations made thereunder an appeal shall lie to His Majesty in His Privy Council from the judgment of the Court of Appeal for Ontario in a certain action in the Supreme Court of Ontario between Montreal Trust Company, as plaintiff, and Abitibi Power & Paper Company Limited, Joseph P. Ripley, Stanton Griffis, Milton C. Cross, W. H. Somerville, Robert N. Reid, Andrew Fleming and W. A. Arbuckle, as defendants, such judgment being dated the 21st day of March, 1942, and being a judgment dismissing an appeal from an order of the Honourable Mr. Justice Middleton, dated the 4th day of December 1941, whereby amongst other things there was ordered the sale of all the real and personal property, assets and effects of the defendant Abitibi Power & Paper Company Limited.

"(2) Such appeal may be taken by the defendant Abitibi Power & Paper Company Limited and notwithstanding anything contained in *The Privy Council Appeals Act*, *The Judicature Act* or any other Act or any rules or regulations made thereunder such appeal by such defendant shall be allowed and admitted and thereupon all proceedings under the said order or the said judgment and all execution of, on or under the said order or the said judgment shall be stayed pending the determination of such appeal, the whole without the giving of any security; and the provisions of section 8 of *The Constitutional Questions Act* shall apply to such appeal in all respects as though such appeal were an appeal by His Majesty in right of the Province of Ontario from a judgment of a Court on a reference under *The Constitutional Questions Act*."

An application was made to me by the liquidator in the name of the defendant company to admit an appeal from the

judgment of the Court of Appeal to the Judicial Committee. After hearing argument, I directed that the application be referred to the Court of Appeal, considering that an appeal would, in any event, be taken from any order I might make. The application therefore came before this Court.

There was much argument before us with respect to the power of the Legislature to pass this last-mentioned Act, and the provisions heretofore made for appeals as of right to His Majesty in Council, beginning with the Proclamation of 1763, and continuing down to The Privy Council Appeals Act, R.S.O. 1937, c. 98, were carefully reviewed and discussed.

In the view that I take of the matter it is not necessary to determine on this application the broad question whether or not it is within the jurisdiction of the Provincial Legislature to extend the area of the right of appeal as defined in s. 1 of The Privy Council Appeals Act, which has long existed.

The Abitibi Moratorium Constitutional Question Act, 1942 is not, in my opinion, one that it is within the power of the Legislature of Ontario to enact. The Court of Appeal, the highest Court in the Province, having already given its judgment on the matter in controversy, the Legislature by this Act assumes to grant to one of the parties to the action a right of appeal to the Judicial Committee from that judgment. As appears by the preamble, the purpose of the Act is to obtain the opinion of the Judicial Committee upon a constitutional question that the Attorney-General cannot conveniently bring before it under The Constitutional Questions Act, R.S.O. 1937, c. 130. This insolvent company is therefore placed in the favoured position of not being required to give any security as other appellants are required to do, and is relieved from all the restrictions of The Privy Council Appeals Act as if this were an appeal under The Constitutional Questions Act. Nothing is to be done by any Court in Ontario except to perform the function, which the Act makes in this case a mere clerical one, of transmitting the case to the Judicial Committee for its opinion. This Act does not, in my opinion, come within the description of a law relating to the administration of justice in the Province, in respect of which the Legislature of the Province has jurisdiction under s. 92(14) of The British North America Act, and no attempt was made to support it under any other head.

That does not, however, dispose finally of the question whether the appeal of the defendant company is one that can be admitted. The provisions of The Privy Council Appeals Act must be considered, and in my opinion the proposed appeal is one that we both can admit and ought to admit under that Act, upon the terms contained in it.

Objection was taken that the order of Middleton J.A. and the order of the Court of Appeal dismissing the defendant company's appeal from it are not final orders, but are interlocutory. That may be true as these terms are commonly applied to legal proceedings. The sale of the mortgaged premises in the event of default, appears to be one of the trusts of the bond mortgage which the judgment in this action of 3rd November 1937 declared ought to be performed and carried into execution. The order of Middleton J.A. that the property be sold by the Master merely implements what the judgment in the action had declared to be the right of the plaintiff and of the bondholders. It is not a final order either in the sense that it effects a change in the ownership of the mortgaged property. Notwithstanding the order, there may be no sale, as there was no sale under the similar order of 10th June 1940. Is it, however, a fatal objection to the admitting of an appeal to the Judicial Committee that the order or judgment sought to be appealed from is one that is classified as interlocutory?

Neither in the Proclamation of 1763, nor in The Privy Council Appeals Act, R.S.O. 1937, c. 98, nor in any of the several statutes and ordinances that come between, defining the right of appeal to the Privy Council, are there any words that draw a line between such judgments or orders as are final and such as are interlocutory. In the Proclamation of 1763 the words are "with Liberty to all Persons who may think themselves aggrieved by the Sentences of such Courts, in all civil cases, to appeal, under the usual Limitations and Restrictions, to Us in our Privy Council." The Constitutional Act of 1791, which divided what had been called Quebec into the two Provinces of Upper Canada and Lower Canada, was even more indefinite than the Proclamation of 1763 in defining the cases in which an appeal should lie as of right to His Majesty in His Privy Council. One goes to ordinances and statutes made in Canada under authority that has varied from time to time, for any more particular definition of the appeal as of right. None of them contains anything to the

present purpose that is not to be found in s. 1 of The Privy Council Appeals Act, which is as follows:

"1. Where the matter in controversy in any case exceeds the sum or value of \$4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to His Majesty in His Privy Council, and, except as aforesaid, no appeal shall lie to His Majesty in His Privy Council."

No one would contend that from every interlocutory order in an action that involves more than \$4,000 in amount or value an appeal lies as of right to the Privy Council under this statute. Interlocutory orders, even in such an action, do not commonly answer to the description in the statute of what may be appealed, as the statute is properly interpreted. But I do not think there is anything in the statute that excludes an appeal upon the simple ground that the order or judgment sought to be appealed from is interlocutory, where there are exceptional circumstances and the matter to be determined is of importance and one proper for submission to the Privy Council.

In an Indian appeal, where the matter in controversy related to the appointment of an interim receiver, and to a discharge in part of the order appointing a receiver, after discussing the appeal and concluding that the appeal failed, Lord Sumner said:

"Their Lordships remark that it was with some doubt in the mind of at least one of the judges of the High Court that leave to appeal to His Majesty in Council was given in this case, and they think it right to add that, as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review by the Judicial Committee. Not only are the practice of the Court and the manner in which experience has shown that it is wise to apply it, better known to the High Courts in India than they can be to their Lordships, but the delay occasioned by taking this additional appeal adds gravely to the procrastination, which is already the bane of Indian litigation." (*Benoy Krishna Mukherjee v. Satish Chandra Giri* (1927), L.R. 55 Ind. App. 131 at pp. 134-135).

Appeals to His Majesty in His Privy Council from India are not governed by the proclamation and ordinances and statutes that apply to Canadian appeals, and the right of appeal has had a different history, but, if with great respect I may presume to say so, the observations of Lord Sumner that I have quoted in relation to granting leave to appeal to His Majesty in Council from interlocutory orders in the case of Indian appeals may well be applied to the admitting of appeals under the Ontario statute from which I have quoted.

While the value of the mortgaged premises that Middleton J.A. has ordered to be sold is enormous, and the amounts invested by shareholders of the several classes, and owing to unsecured creditors, that are in jeopardy if a sale is made as ordered, are very great, the matter that is particularly in controversy at the moment is the validity of The Abitibi Power & Paper Company Limited Moratorium Act, 1941 (Ont.), c. 1. The defendant company, through its liquidator, claims that this statute gives it the right to have the sale deferred while the statute is in force. Presumably by reason of the fact that the duration of that Act as fixed by s. 4 will come to an end before, in the ordinary course, another meeting of the Legislature will be held, the Legislature at its 1942 session, lately closed, passed an Act further extending the period in which there shall be no sale. This new right set up by the defendant company under the Act of 1941 is disputed by the plaintiff and by the individual defendants, and it has been decided by the Courts of this Province that no such right exists because the statute is not within the legislative powers of the Legislature.

Although I have not formed an opinion one way or another as to the powers of the Ontario Legislature to enact the statute in question, it is, I think, of some importance to a full appreciation of the present position to know something of the special interest of the Province in the property proposed to be sold.

An essential part of the property covered by the mortgage consists of leases, licences, agreements, water power rights, privileges, franchises and concessions granted by the Province of Ontario. As is stated in the report of a Royal Commission that inquired into the affairs of the defendant company, whose report is before us and was referred to in argument, "Abitibi is dependent for its supply of pulpwood upon the Crown lands of

the Province of Ontario. It also requires large quantities of power, in respect of which it is dependent upon leases from the Province." These licences, leases and other rights are granted in most, if not in all, cases for fixed terms of years, and some of these have expired or are about to expire. As to some others the company is in default either in payment or in the performance of its covenants. If the Province of Ontario should exercise its rights strictly, the mortgaged premises would hardly be saleable at any price. Mills in which large sums of money are invested would be worthless without power to run them or pulpwood to supply them. In the report of the Royal Commission to which I have referred there is set forth on pages 10 and 11 a long list of the defendant company's further requirements from the Province, as given by the receiver. No doubt the Province is in the habit of co-operating fairly with persons who invest their money in establishing and developing industries on the lands of the Crown and in opening them up to settlement, and improving them, but when, as here, there may be danger that many persons who have invested largely will lose their investment, the Government of the Province may have some concern. It may well be that on a sale for cash none but bondholders who can turn in their bonds in payment, will be in a position to buy, especially in view of the difficulty of raising large amounts of capital for such investment in war time. To avoid a result that may wipe out the investment of a great many people and that in such an event may cause some embarrassment to the Government in dealing with the property rights and interests of the Province, it is, to say the least, understandable that the proposed sale for cash should be the subject of some concern to the Legislature, whatever opinion one may have as to the power of the Legislature to enact the statute in question.

It may well be that even if the statute is found to be valid, it will at best do no more than postpone the inevitable. However that may be, it seems improbable that a sale for cash will be carried to completion without some way being found to fulfil the desire of the Legislature "that the question of the constitutional validity of the Act be passed upon by the Court of last resort."

The question of the power of the Provincial Legislature to pass an Act to prevent a sale at this time, notwithstanding the

terms of the mortgage and the judgment for its enforcement, is a new issue in this action. Of its importance there can be no doubt, and under these special circumstances I am of the opinion that the application to admit this appeal to the Judicial Committee should be granted. As the order can only be made under the provisions of The Privy Council Appeals Act, the appeal can only be admitted upon the terms set forth in that statute. Proper security must be provided, and when it is provided an order should go approving the security and admitting the appeal. Counsel for the applicant undertook on the argument of the motion that if leave were granted the appeal would be expedited.

The costs of the application should be costs in the appeal.

29th April 1942. MASTEN J.A.:—This is an application to admit an appeal to the Judicial Committee of the Privy Council from the order of the Court of Appeal dated 21st March 1942, which dismissed an appeal from an order of Middleton J.A. dated 4th December 1941, whereby a sale under the direction of the Master of the assets and undertaking of the defendant company was directed.

The history of the events and proceedings leading up to the present application have been fully stated in the reasons for judgment of my Lord the Chief Justice, and I do not propose to repeat them.

I may say at once that with some doubt I agree with my Lord's conclusion that the company's motion to admit an appeal to the Privy Council ought to be granted on proper terms, and I arrive at that conclusion by a process of reasoning similar to, though not identical with, that adopted by my Lord.

I find the Abitibi Moratorium Constitutional Question Act, 1942, *ultra vires*, invalid and inapplicable to the determination of the present application. It provides as follows: [*see supra*, p. 333].

If the Act were valid and effective, this Court would be shorn of any right to consider judicially whether the proposed appeal ought or ought not to be admitted, for it is peremptorily directed to sign an order admitting the appeal. The judicial function of determining whether the appeal ought or ought not to be admitted has always hitherto been vested in the Court appealed from. I direct attention in the first instance to Rule 2 of the Rules of

the Judicial Committee of the Privy Council, which reads as follows:

"2. All appeals shall be brought either in pursuance of leave obtained from the Court appealed from, or, in the absence of such leave, in pursuance of special leave to appeal granted by His Majesty in Council upon a Petition in that behalf presented by the intending Appellant."

In *E. W. Gillett & Co. Limited v. Lumsden*, [1905] A.C. 601, Lord Macnaghten spoke as follows:

" . . . On considering the 'Act respecting Appeals to Her Majesty in Her Privy Council,' it seems clear to their Lordships that an allowance of the appeal is contemplated, and such an allowance must be one by the Court of Ontario. Having regard to the consequences that would follow from admitting an appeal, their Lordships think it is essential that the appeal should be admitted by the Court, and that the Court is bound to exercise its judgment in considering whether any particular case is appealable or not."

Subsequently, in the case of *Davis et al. v. Shaughnessy et al.*, [1932] A.C. at page 111, Viscount Dunedin spoke as follows:

"Their Lordships wish to repeat what Lord Macnaghten said as to its being the duty of the Court to come to a conclusion and either to allow the appeal or not. If they allow it, the result usually will not be questioned. If they do not allow it, then the wishful appellant can always present a petition for special leave to appeal"

In *Patton et al. v. Yukon Consolidated Gold Corporation Ltd. et al.*, [1936] O.R. 308; *E. W. Gillett & Co. Limited v. Lumsden* and *Davis et al. v. Shaughnessy et al.* were quoted and applied by Middleton J.A. as imposing on the Court that hears the application to admit the appeal the duty of disposing of all questions relating to its competency.

Another reason amply supported by the highest authority is to be found in the principles and rules laid down by the Privy Council in the case of *British Coal Corporation et al. v. The King*, [1935] A.C. 500 and developed and elaborated by the Supreme Court of Canada in the case of a *Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 entitled "An Act to amend the Supreme Court Act"*, [1940] S.C.R. 49, [1940] 1 D.L.R. 289.

In the case last mentioned Duff C.J.C. sums up his conclusions as follows (see pages 69 and 70) :

“My opinion, therefore, is:

“First, that since, by the Statute of Westminster, the obstacles have been removed which prevented the Parliament of Canada giving full effect to legislation for objects within its powers affecting the appeal to His Majesty in Council, there is now full authority under the powers of Parliament in relation to the peace, order and good government of Canada in respect of the objects within the purview of section 101 to enact the Bill in question.

“Secondly, that neither the prerogative power of His Majesty to admit appeals from Canadian courts, nor the exercise of that power in admitting such appeals, nor the jurisdiction of the statutory tribunal, the Judicial Committee of the Privy Council, in respect of such appeals, or in respect of appeals as of right, is subject matter for the legislative jurisdiction of the provinces as comprised within the local matters assigned to the legislatures by section 92, and all such matters are, therefore, within the general authority in relation to peace, order and good government”,

and Rinfret J., at page 73, uses the following language:

“We must conclude that *a fortiori* the provincial legislatures could not effectively legislate with regard to the abolition of appeals to the Privy Council as the law stood before the Statute of Westminster; and, as they continue as before to have no legislative capacity to make any law having extra-territorial operation, they have no power to deal with the matter of appeals to the Privy Council.”

Counsel for the intervenent Province seeks to support the validity of the statute in question as legislation respecting the “administration of justice in the Province,” being Head 14 of s. 92 of the B.N.A. Act. But the statute in question does not relate in any sense to the general administration of justice, but is an adjudication between the parties to this action on the facts of this case, and thus becomes an intrusion by the Legislature into the judicial province in respect of a matter not within but without the Province.

If the Act of 1942 were to be held valid, the judicial discretion hitherto exercised by this Court would be abolished and it would

be usurped by the Legislature, the Court being demoted to the position of a clerical automaton. Such a result appears to me to be contrary to the fundamental basis of the constitution, and therefore *ultra vires* and invalid.

The considerations above mentioned suffice, in my opinion, to eliminate from further consideration the Ontario statute of 1942.

The statute of 1942 being eliminated, the next step in my opinion is to consider whether a direct right of appeal to the Privy Council from the highest Provincial Court existed "as of right" immediately prior to the enactment of The British North America Act, and whether that right was preserved by s. 129 of that Act and is applicable to this case. After careful consideration, I am of opinion that the answer to that question is in the affirmative. S. 129 reads as follows:

"129. Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act."

As I understand the matter, both parties to the present application concur in the view that down to the passing of the British North America Act, the right of appeal to the Privy Council was governed by Imperial authority acting through its delegates in Canada, that is, either through the Governor-in-Council or through the Governor and the Provincial Legislature.

When the British North America Act was passed, the power to deal with the appeal to the Privy Council by delegated Imperial authority was superseded by the powers of direct legislation conferred by ss. 91 and 92 of that Act, but unless and until the powers so conferred were exercised, s. 129 preserved the existing situation.

Unless the Ontario statutes of 1941 and 1942 above-mentioned can be so regarded, no legislation that interferes with the appeal as of right in civil cases has ever been proposed, and that right, which then became crystallized and stabilized as it then stood, continued to exist for our consideration on the present application.

In other words, we are to consider the present application to admit this appeal pursuant to the established practice under The Privy Council Appeals Act, R.S.O. 1937, c. 98, disregarding the Ontario statutes of 1941 and 1942.

I think that the order of Middleton J.A. directing the sale is an interlocutory and not a final order, as it is directed only to working out the rights of the parties as declared in the final judgment of Kingstone J., pronounced in 1937: *Norton v. Norton* (1908), 99 L.T.R. 709; *Clarke v. Huron County Flax Mills* (1922), 51 O.L.R. 560, 69 D.L.R. 589.

The order of Middleton J.A. being interlocutory, the question next arises whether an appeal to the Privy Council from an interlocutory order exists "as of right". Mr. Tilley's contention is that final orders only are appealable; that the several enactments from 1763 down to 1867 establishing the appeal "as of right", the limitations and conditions attaching thereto, and more particularly the limitation requiring a definite sum of money to be in question, establish by necessary implication that the only existing appeal is from a final judgment, and that interlocutory orders are excluded.

I find myself unable to agree with Mr. Tilley's argument. The original proclamation of 1763 is broad enough in its terms to include every judgment and order, whether final or interlocutory, and after careful consideration I arrive at the conclusion that neither expressly nor by necessary implication did the subsequent Imperial statutes and orders establish a limitation excluding a right of appeal from interlocutory orders.

The observation of Lord Sumner in delivering the judgment of the Privy Council in *Benoy Krishna Mukherjee v. Satish Chandra Giri* (1927), L.R. 55 Ind. App. 131, seems to me to be of a general character and applicable to the present case where he says, at page 134 [see *supra*, p. 336].

In the present case I think that there exist such special circumstances as warrant this Court in admitting the appeal

though the order in question is interlocutory. In this aspect I adopt the grounds assigned by my Lord the Chief Justice, to which I would add the following. Not only has the whole situation become most confused and difficult, but also a situation has arisen where wide-spread public interests are involved, and where, if allowable in law, the disentangling assistance of the Judicial Committee should be invoked. The appeal is earnestly desired not only by the junior security holders, but also by the Crown, which is involved not only as the holder of the Crown domain and water powers, but also because it not only owes a duty to the junior security holders and to the public, but also has the obligation to see that the contractual obligations held by the bondholders are not lightly disregarded.

For these reasons I have, with grave doubts, concurred in an order admitting this appeal.

I desire to add an observation that is not strictly relevant to the disposition of the present motion to admit the appeal. Having been interested for many years in company law, including the reorganization of insolvent companies, I have been strongly impressed by the unfortunate, extravagant, and futile course of the present litigation; and, on the other hand, with the value and importance of the statement contained in the Report of the Royal Commission (which formed part of the material before us). It is there said: "We have considered the proceedings taken and the existing legislation relevant to the reorganization of companies, and are impressed with the inadequacy of existing legislation to meet the situations that arise when companies find themselves in financial difficulties." The report then proceeds to discuss the provisions contained in subsection (i) of s. 15(i) of The Judicature Act, R.S.O. 1937, c. 100; The Companies' Creditors Arrangement Act, 1933, (Dom.), c. 36, and s. 123 of The Companies Act, 1934 (Dom.), c. 33 and then proceeds as follows: "In practice, compliance with the requirements of these Acts is often difficult and sometimes impossible. It has been held that any disposition made by a Court on such an application should be just and equitable, but there is no provision in our procedure for ascertaining what the property of the company is worth or what its probable earnings may be or what equity is available for the various classes interested."

The suggestions so made are, in my opinion, most valuable, and the difficulty could easily be met by a provision in The Com-

panies' Creditors Arrangement Act, 1933 (Dom.), c. 36, conferring jurisdiction on the Court, where a scheme of reorganization is brought before it, to consider the plan, to take evidence and hear the contentions of the several interested classes of holders of securities, to settle their priorities and interests, to vary the plan as proposed, and to sanction the plan as modified by it.

I may add that the American Bankruptcy Act contains provisions which might afford valuable suggestions for such an enactment.

McTAGUE J.A. agrees with ROBERTSON C.J.O.

16th May 1942. A motion was made for the approval by the Court of the security offered for the appeal, and an order was made as asked. Counsel also moved for an order staying the operation of the order of Middleton J.A., but the Court expressed the opinion that this matter, if it arose, could be dealt with by a single judge.

Appeal admitted.

Solicitors for the plaintiff, respondent: Johnston, Heighington & Johnston, Toronto.

Solicitors for the defendant company, appellant: Wright & McMillan, Toronto.

Solicitors for the individual defendants: Blake, Lash, Anglin & Cassels, Toronto.

Solicitors for the preference shareholders' protective committee: Slaght, Ferguson & Carrick, Toronto.

Solicitors for the common shareholders' protective committee: Daly, Hamilton & Thistle, Toronto.

Solicitors for the general creditors' protective committee: Fraser, Beatty, Palmer & Tucker, Toronto.

[HOPE J.]

Re Lawson.

War Measures—Detention under The Defence of Canada Regulations, Reg. 21—Form of Minister's Order—Effect of Death of Minister between Making and Execution of Order—Subsequent Order, after Execution, by Successor of Minister Making first Order.

The validity of an order for detention, made under Regulation 21 of The Defence of Canada Regulations, is not affected by the death of the Minister of Justice before the execution of the order. The Minister must be "satisfied", when the order is made, that the detention is necessary, and although he may later change his mind, it cannot be argued that he must also be shown to have been "satisfied" when it is executed. *Greene v. Secretary of State for Home Affairs*, [1941] 3 All E.R. 388; *Liversidge v. Anderson et al.*, [1941] 3 All E.R. 338, considered. All orders either for detention or as to the place and manner of detention are orders of the Minister for the time being *qua* Minister, and once regularly made they continue valid despite the death or retirement of any particular incumbent of the office.

AN application under a writ of *habeas corpus*, for the discharge of one William T. Lawson, detained pursuant to an order of the Minister of Justice made under Regulation 21 of The Defence of Canada Regulations.

27th and 29th April 1942. The application was heard by HOPE J. in Chambers at Toronto.

J. L. Cohen, K.C., for the applicant.

R. L. Kellock, K.C., and *J. D. Arnup*, for the Governor of the Toronto Gaol, respondent.

15th May 1942. HOPE J.:—Following an application made before Henderson J.A. in Chambers on 24th April 1942, a writ of *habeas corpus ad subjiciendum* was issued, addressed to Walter L. Rayfield, V.C., Governor of the Toronto Gaol, to show cause for his holding the applicant Lawson in custody. Upon the return of this writ on 27th April, the gaoler justified the detention under and by virtue of the orders of the Honourable the Minister of Justice of Canada dated 14th August 1940, and 7th April 1942. The first of these two orders is in the following form:

"PMA/CV

Ottawa, 14th August, 1940

"MEMORANDUM FOR THE MINISTER OF JUSTICE

J.R. 4519-3-40

Re: Defence of Canada Regulations
regulation 21

"Attached hereto is a memorandum, dated the 12th August 1940, submitted by the Commissioner of the Royal Canadian

Mounted Police, containing a list of three persons whom he recommends should be detained under the provisions of regulation 21 of the Defence of Canada Regulations.

"In view of the information disclosed in this memorandum, if you are satisfied that with a view to preventing these persons from acting in a manner prejudicial to the safety of the public or the safety of the State it is necessary so to do, it is recommended that you make an Order directing that they be detained under the provisions of the above mentioned regulation.

'P.M.A.'

"Approved

" 'Ernest Lapointe'

"Minister of Justice"

"EXTRACT from list submitted by the Commissioner of the Royal Canadian Mounted Police and referred to in the Order of the Minister of Justice, dated 14th August, 1940.

" '1. WILLIAM T. LAWSON' "

This order was signed as approved by the late the Right Honourable Ernest Lapointe as Minister of Justice. For reasons which have no bearing upon this application, the order was, however, not executed so as to bring the said Lawson in detention until 5th April 1942.

On 26th November 1941, in the interval between the issue of the order and the applicant's detention, Mr. Lapointe departed this life, and his successor, the Honourable Louis S. St. Laurent, was sworn in as Minister of Justice on 10th December 1941. The order of 7th April 1942 is executed by Mr. St. Laurent as Minister of Justice, and is in the following form:

"PMA/CV

Ottawa, 7th April, 1942

"ORDER FOR DETENTION

made under the authority of regulation 21 of the
Defence of Canada Regulations

"Under date of the 14th August, 1940, the Right Honourable the Minister of Justice of Canada being satisfied that with a view to preventing

WILLIAM T. LAWSON

of Toronto, Ontario, from acting in any manner prejudicial to the public safety or the safety of the State it was necessary so to do, issued an order that he be detained under the provisions of regulation 21 of the Defence of Canada Regulations, and I

hereby order and direct that the said WILLIAM T. LAWSON be detained in the Toronto Gaol at Toronto, aforesaid, under similar conditions to those of a person held pending trial until his objection to such detention has been heard and disposed of, or until he has indicated that he does not propose to make an objection, or the time for making such objection has expired and no objection has been made, when, unless otherwise ordered by me, he shall be transferred to and detained in an internment camp and held under the conditions prevailing at such camp;

“AND I DO HEREBY FURTHER ORDER AND DIRECT that the said WILLIAM T. LAWSON be detained in the custody of the Royal Canadian Mounted Police from time to time, as occasion may require, for the purpose of taking him from the said Toronto Gaol to stand trial on any charge or charges which may be preferred against him under the National Registration Regulations 1940 (P.C. 3156 of the 12th July, 1940) and amendments thereto, and returning him to the said Gaol;

“AND I DO HEREBY FURTHER ORDER AND DIRECT that, should the said WILLIAM T. LAWSON be convicted on any such charge as aforesaid and sentenced to imprisonment, he be released from the said Toronto Gaol, if necessary, for the purpose of serving such sentence and upon his release from such imprisonment, whether on bail or otherwise, he be detained again in the said Toronto Gaol in accordance with the provisions hereinbefore set out.

“ ‘Louis S. St. Laurent’

“Minister of Justice.”

The form of the first order above set out was the same as that which came under review and was sustained in the proceedings *Re Sullivan*, [1941] O.R. 417, 75 C.C.C. 70, [1941] 1 D.L.R. 676.

By an order in council P.C. 3720 dated 5th August 1940 (published in the Canada Gazette, Vol. LXXIV, p. 407), and referring to orders issued under Regulation 21 of The Defence of Canada Regulations, it was provided:

“and Whereas the Acting Minister of Justice reports that since this regulation came into force recommendations for the detention of one or more persons have been submitted to the Minister of Justice or the Acting Minister of Justice and where approved have been so indicated on the recommendations under the

signature or initials of the Minister or Acting Minister and were considered and acted upon as orders . . . it is hereby ordered that all recommendations for detention of any particular person or persons under Regulation 21 of the Defence of Canada Regulations approved, or which may hereafter be approved, under the signature or initials of the Minister of Justice or the Acting Minister of Justice . . . above referred to, shall be deemed to be and shall be construed for all purposes as valid orders made pursuant to the provisions of the said regulation."

The War Measures Act, R.S.C. 1927, c. 206, s. 3(2) provides:

"All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor-in-Council may prescribe."

In this application there is, therefore, no attack made by the applicant upon the form of the orders in question other than as may be hereafter particularized. The sole attack, as I appreciate it, is based upon the grounds very tersely stated by the applicant's counsel at page 68 of his argument in reply, as follows: "So far as the point raised here is concerned, that is, whether or not the order of the late Minister of Justice made in August 1940 and also the order made in June 1940 (apparently referring to order in the *Steele* case dated in July) are still valid, they not having been executed or given effect to at the time the late Minister died."

Mr. Cohen argued that since the order, according to his interpretation of the decisions of the House of Lords in both *Greene v. Secretary of State for Home Affairs*, [1941] 3 All E.R. 388, and *Liversidge v. Anderson et al.*, [1941] 3 All E.R. 338, is dependent on the subjective condition of the mind of the Minister, the order became a nullity with the death of the Minister. This is an argument which I fail to follow either in law or in common sense. An order under Regulation 21 clearly gains its validity at the time of the issue of the order, which is the pertinent point of time at which the Minister must be satisfied that with a view to preventing any particular person from acting in any manner prejudicial to the public safety or the safety of the State, it is necessary to detain such person. Counsel further argued that the Minister, even after the formal issue of the order in the manner provided, might change his

state of mind, and that his state of mind could only be fully appreciated if and when the order was put into effect by the actual detention of the person in question. But, in my opinion, such a contention cannot be tenable for one moment. It would be contrary to all reason to agree with counsel's argument. If effect were given to such a contention, then it would be found that, however long or short the period might be between the actual approval of the order by the Minister of Justice and the physical act of the detention of the person, it would be necessary for the official effecting the detention to communicate with the Minister at the moment of the detention to ascertain if the Minister were at that moment "satisfied."

I think it must be taken that the order, as set out in P.C. 3720 above quoted, is valid from the time of its signature by the Minister of Justice. It may well be that the Minister, after the issue of the order, may change his satisfied state of mind as a result of a finding and recommendation of the Advisory Committee set up under Regulation 22, or as a result of other information acquired, and in consequence of such change of mind may release the person in question under Regulation 26; or, if the person has not already been detained, may cancel the order earlier issued. But, until so cancelled, the order, being valid at the time of its issue, and such validity being reinforced, so to speak, if need be, by virtue of P.C. 3720, would continue valid. It is inconceivable to me that it should be vitiated by the demise or resignation of the person who held the appointment of Minister of Justice at the time of its issue. Were effect to be given to this argument of the applicant's counsel, what an absurdly impossible and anomalous situation would be the sequel to the death of a Minister of Justice when, as was well suggested by the respondent's counsel, there would be, in effect, the equivalent of a general gaol delivery.

Regulation 21(1) provides:

" . . . and any person shall, while detained by virtue of an order made under this paragraph, be deemed to be in legal custody."

Since it is not in controversy that the order of 14th August 1940, was *made* under the provision of Regulation 21, and that such order was not cancelled before the date of the taking into custody, I have no hesitancy in declaring the detention to be

legal custody under and by virtue of the order of 14th August 1940, and this application must be dismissed.

The main question for determination on a motion such as this is whether there is legal cause of detainment. As was said by Lord Macmillan in *Greene v. Secretary of State for Home Affairs, supra*, at p. 396:

"The result, in my opinion, is that the production of the Secretary of State's order, the authenticity and good faith of which are in no way impugned, constitutes a complete and peremptory answer to the appellant's application. It justifies in law his detention, in the absence of any relevant challenge of its validity, and there is no such challenge."

Again, it is of interest, in view of the applicant's contention herein, to note the words of Lord Wright in the same case at p. 402, when, after quoting from the *Middlesex Sheriff's Case* (1840), 11 Ad. & E. 273, the words of Denman C.J., "I think that the production of a good warrant is a sufficient answer", Lord Wright continues:

"I think that this applies to the present case. The order made by the Home Secretary in the terms of reg. 18b speaks for itself. It is admissible as a public executive document to show a good cause for the detention, and needs no extrinsic justification. It is good on its face unless and until it is falsified."

Finding as I do that the detention herein is legal, I do not feel that the subsequent order of 7th April 1942, is anything more than such further order or orders as to the place and conditions of detention as is contemplated by the words of Regulation 21(1) (c) namely, "as the Minister of Justice may from time to time determine." All orders, either of first instance for detention, or subsequently as to the place and conditions of the detention, are orders of the Minister for the time being *qua* Minister, and once made with regularity are as such of continuing validity despite the death or retirement of any particular incumbent of the office and the appointment of his successor or despite the appointment of an acting Minister during the temporary absence or incapacity of the Minister himself.

I do not consider that it is essential for me to discuss further the second order, issued after the taking into custody of the applicant.

For these reasons I am of the opinion that the application must be refused. In the circumstances there should be no order as to costs.

Application refused.

Solicitor for the applicant: J. L. Cohen, Toronto.

Solicitors for the respondent: Mason, Foulds, Davidson & Kellock, Toronto.

[COURT OF APPEAL.]

Gartlan v. The City of Toronto.

Highways—Municipal Liability for Non-repair—City Crossing—Higher Duty of Municipality with Respect to Crossing than with Respect to Roadway Generally—The Municipal Act, R.S.O. 1937, c. 266, s. 480.

Where part of a city roadway is intended to be used as a pedestrian crossing, the standard of repair reasonably required of the municipality is higher than that required for the roadway generally, because of the common and intended use of the crossing by pedestrians. *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139 at 141, applied; *Morrison v. City of Hamilton*, [1939] O.R. 349, [1939] 3 D.L.R. 159, explained. On the facts of the present case, *held*, notwithstanding this higher degree of care, the plaintiff, who had fallen in such a crossing, had failed to establish a condition of non-repair sufficient to support the action.

AN appeal by the plaintiff from the judgment of Jackson Co. Ct. J., dismissing an action for damages.

The plaintiff, while crossing an intersection in the city of Toronto, in the space marked out by white lines on the pavement, caught her foot in a hole in the pavement and fell, sustaining injuries.

10th March 1942. The action was tried by JACKSON Co. Ct. J. without a jury at Toronto.

J. P. Manley, K.C., for the plaintiff.

J. Johnston, for the defendant.

31st March 1942. JACKSON Co. Ct. J. (after reviewing the facts):—In *Morrison v. City of Hamilton*, [1939] O.R. 349, [1939] 3 D.L.R. 159, the question of what constitutes a street crossing was considered by the Court of Appeal. In that case the cases of *City of Kingston v. Drennan* (1897), 27 S.C.R. 46, and *Ince v. City of Toronto* (1901), 31 S.C.R. 323, were considered and the difference was pointed out between street cross-

ings as usually constructed at the time those cases were decided and the conditions which obtain at the present time.

Robertson C.J.O. in the *Morrison* case, at p. 352, laid down the law as follows: "In my opinion there is nothing in the authorities relied upon by the appellant that compels us to hold that the crossing now in question is a sidewalk within the meaning of s. 480 of The Municipal Act, and I think it should be held that it is not a sidewalk."

I therefore hold that the only obligation resting upon the defendant in this case is the obligation which arises under The Municipal Act in reference to a highway, and not the obligation which rests upon it in regard to a sidewalk, and I find on the evidence that the condition which existed at the time of the accident was not a condition of non-repair *qua* highway.

It was, however, strongly argued on behalf of the plaintiff that because the area had been set apart for the use of pedestrians and marked by white lines, this placed upon the defendant the same responsibility which would rest upon it in regard to the repair of sidewalks. The question therefore is, does the marking off of street crossings in the manner indicated in this case change the responsibility resting upon the defendant in regard to repair? I find against such contention. The marking off of the crossing in the manner referred to was done by the police department, and was done pursuant to the provisions of s. 39(3a) of The Highway Traffic Act, R.S.O. 1937, c. 288, as enacted by 1941 (Ont.), c. 22, s. 10, and is as much for the purpose of directing the drivers of vehicular traffic as it is for pedestrians. The lines indicate the place where the vehicular traffic shall stop at traffic lights in order to allow pedestrians to cross. At many intersections no such lines are laid down and clearly at such intersections the liability of the municipality would be only that which attaches to a roadway. As the Chief Justice puts it in the *Morrison* case, at p. 352:

"In every respect the crossing is part of the roadway and there is nothing whatever to distinguish it as set apart for the use of pedestrians."

The width between the white lines in this case was some eight feet, almost twice the width of the sidewalk to which the plaintiff was going. I find that the white lines did not increase the responsibility of the municipality in this case.

I find, therefore, that the plaintiff has failed to establish liability on the part of the defendant for the injuries of which she complains.

In the event of a successful appeal, I would assess the plaintiff's damages at \$540.00.

Even if I had found on the evidence that the defendant had failed to meet the obligation to repair resting upon it by the statute, I would also on the evidence find that the plaintiff had been guilty of contributory negligence. She swears that when she saw that the light was in her favour she proceeded straight across the street, looking straight ahead and without looking at the pavement. A glance at the pavement, which could have been made in a split second, would have shown her the hole in question. Her husband also testified that he crossed in the same place twice a day and that he noticed the hole; that it was quite obvious that it had been there for a considerable time. There is an obligation resting upon pedestrians to take reasonable care to see where they are walking; the municipality is not in the position of an insurer. Had I come to the conclusion that there was liability on the part of the defendant, I would hold the plaintiff 70 per cent. responsible and the defendant 30 per cent. responsible.

18th May 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and FISHER JJ.A.

J. P. Manley, K.C., for the appellant:—The action results from an accident to the appellant when she stepped into a hole on Roncesvalles Avenue, in the city of Toronto, at the intersection of that street with Howard Park Avenue. Various witnesses saw the hole in the roadway some time prior to the accident. The roadway had not been re-surfaced since it had been laid some years ago, and the condition of the road is shown from the evidence. There was another hole nearby, and also a number of cracks. That is a condition of non-repair.

At the point where the appellant was crossing, there was a space 12 feet wide, marked by white lines painted on the highway and extending across it, as a place for pedestrians to cross. The appellant's attention was on the traffic proceeding southerly on Roncesvalles Avenue, and was also diverted by welders who were working on the street car tracks nearby.

The liability of the municipality is set out in s. 480(1) of The Municipal Act, R.S.O. 1937, c. 266. For the test as to liability, see *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139 at 141, cited and approved in many subsequent cases, such as *Raymond v. Township of Bosanquet* (1919), 59 S.C.R. 452 at 455, 459, 50 D.L.R. 560.

The road here in question, in a busy locality and being a traffic artery of the city of Toronto, was not in a proper state of repair.

The trial judge erred in applying *Morrison v. City of Hamilton*, [1939] O.R. 349, [1939] 3 D.L.R. 159, which was a case on the liability of a municipality when snow and ice accumulate on a highway.

Certain portions of a highway, such as intersections, require greater care by the municipality to keep in repair than other parts. Pedestrians are invited to cross at intersections: *Bland v. The King et al.*, [1941] O.R. 273, [1941] 4 D.L.R. 414; see also *Newell v. City of Moose Jaw*, [1923] 3 D.L.R. 803 at 805-6, 17 Sask. L.R. 123, [1923] 2 W.W.R. 790; *Curliss v. Village of Bolton*, [1939] O.R. 201, in which the test stated by Masten J.A. in *Clinton v. County of Hastings* (1923), 53 O.L.R. 266, is cited with approval. The duty of a municipality to keep in repair may be greater with respect to some portions of a highway than as to the sidewalks. The mere fact that motor traffic uses the highway is no reason why the pavement should be less safe for pedestrians.

The trial judge erred in finding the appellant 70 per cent. negligent because she had not seen the hole: *Gordon v. City of Belleville* (1887), 15 O.R. 26 at 29. The appellant was not negligent, and the finding of contributory negligence is wrong: *Fogg v. Town of Kenora*, [1940] O.R. 421 at 428; *Keech v. Town of Smith's Falls* (1907), 15 O.L.R. 300.

J. Johnston, for the respondent: The appellant must satisfy the Court of Appeal that the judgment at the trial was wrong. To doubt is to affirm: *McCormick v. Township of Caledon* (1923), 55 O.L.R. 93 at 102.

The trial judge was not under a misapprehension when applying *Morrison v. City of Hamilton*, [1939] O.R. 349, [1939] 3 D.L.R. 159. He recognized that there might be different degrees of repair required for the portions of a highway where

pedestrians cross and for other parts of the highway. Persons crossing a highway must use care, and the duty on the municipality to keep in repair is less for a highway than for a sidewalk: *Belling v. City of Hamilton* (1902), 3 O.L.R. 318.

In *Cresswell v. City of Toronto*, in 1938, unreported, an appeal by the defendant was allowed by the Court of Appeal. In that case there was a small depression in the roadway. As to degrees of non-repair in sidewalks, see *Anderson v. City of Toronto* (1908), 15 O.L.R. 643 at 645. In *South v. City of Toronto* (1922), unreported, Meredith C.J.C.P., held that a depression of 1½ inches in a sidewalk was not non-repair; *Gilmour v. City of Toronto* (1925), 30 O.W.N. 319.

In *Pearson v. City of Toronto*, 1937, unreported, the Court of Appeal held that a hole 2 inches deep by 18 inches wide was not non-repair.

There is an obligation on pedestrians to take reasonable care: *Leeson v. Village of Havelock*, [1940] O.R. 331 at 344, [1940] 3 D.L.R. 665; *Burgess v. Town of Southampton*, [1933] O.R. 279, [1933] 2 D.L.R. 582.

The street was inspected once a week, and the city had received no complaints about the hole in question. The evidence is vague as to how long the hole had been there.

J. P. Manley, K.C., did not reply.

Cur. adv. vult.

19th May 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—An appeal from the judgment of His Honour Judge Jackson of the County Court of the County of York, dated 31st March 1942, dismissing the plaintiff's action.

We agree with the finding of fact by the learned County Court Judge that there was here no condition of non-repair of the highway that would support this action.

We think it desirable, however, to add some observations with respect to the judgment of this Court in *Morrison v. City of Hamilton*, [1939] O.R. 349, [1939] 3 D.L.R. 159, which we think the trial judge has somewhat misinterpreted, or, in any event, has understood as deciding more than it does decide.

That was an action for damages sustained by reason of ice upon a highway crossing. Other conditions of non-repair were alleged, but this Court thought there was no evidence to support

the action in that respect. The defendant alleged that the crossing was a sidewalk, and sought to defeat the action on the ground that the notice necessary in the case of a claim for damages sustained by reason of ice or snow upon a sidewalk, had not been given. This Court held that the crossing in question was not a sidewalk, but was part of the paved roadway.

The judgment proceeded (at p. 353) as follows: "The question to be considered, therefore, is the duty of the appellant in respect of ice upon a roadway, having in mind, however, that at this particular place the roadway is used not only by vehicles, but also as a crossing for pedestrians." The latter part of the sentence quoted, we think the learned trial judge overlooked, for he seems to have considered, on the authority of the *Morrison* case, that the obligation of the municipality in respect of repair of the crossing is the same as, and no higher than, its liability for the state of repair of every other part of the roadway. In our opinion the standard of repair reasonably required at this crossing was higher because of its common and intended use by pedestrians than that required for the roadway generally, between crossings. That is the result of the application of the principle established in the case of *Foley et al. v. Township of East Flamborough* (1898), 29 O.R. 139 at p. 141, and stated less fully in many other cases both before and since that judgment, ". . . regard must be had . . . to the requirement of the public using the road" among other things to be regarded.

We have had this view of the law in mind in concluding that in this case the appellant has failed to establish negligence on the part of respondent, and that the trial judge was right in dismissing the action. The appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, appellant: James P. Manley, Toronto.

Solicitor for the defendant, respondent: C. M. Colquhoun, Toronto.

[COURT OF APPEAL.]

Nolan v. Parsons et al.

Companies—Directors—Fees—Ordering Repayment of Directors' Fees Fraudulently Appropriated and Paid—Fraud on Minority Shareholders—The Companies Act, R.S.O. 1937, c. 251.

The plaintiff, a minority shareholder, sued the other shareholders, who were also the directors of the company, for the return to the company of directors' fees paid for the years 1939 and 1940. The trial judge, and the Court of Appeal, were of opinion that the directors' fees bore no reasonable relation to the services performed by the directors, but were appropriated and paid as the result of a calculated scheme to enhance their financial position at the expense of the plaintiff, by reducing the amount available for the payment of dividends. *Held*, in these circumstances, the actions of the directors constituted fraud, and the plaintiff was entitled to relief. *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350; *Cook v. Deeks et al.*, [1916] 1 A.C. 554, applied.

AN appeal from the judgment of Roach J. in favour of the plaintiff, after a trial without a jury at London.

The plaintiff, as the owner of 50 shares in Hotel Belvedere Limited, sued the four other shareholders, who also constituted the board of directors of the company, for a declaration that directors' fees paid for the years 1939 and 1940 constituted an illegal and improper diversion of the profits of the company, or were illegally withdrawn, and for an order requiring the repayment of the amount so paid. Permission having been refused to the plaintiff to bring his action in the name of the company, the company was added as a party defendant. The further facts appear in the judgment now reported.

14th May 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and MASTEN JJ.A.

J. R. Cartwright, K.C., for the defendants, appellants: The trial judge erroneously proceeded on the basis that there was a fraudulent scheme to appropriate funds of the company. The evidence of fraud is entirely insufficient and the onus of proving fraud is on the plaintiff: *Houston v. Victoria Machinery Depot Ltd.*, 33 B.C.R. 425, [1924] 2 D.L.R. 657. The trial judge overlooked the fact that the proportion of directors' fees to earned profit was less in the two-year period in question than such proportion during the six-year period from 1934 to 1940. The board of directors held a number of meetings each year; and they made the business extremely profitable, reducing the amount outstanding on the mortgage and paying dividends each year. [MASTEN J.A.: I do not think that active fraud is required; it is sufficient to find fraud on evidence of the oppressive

action of the majority as against the minority.] There must be evidence from which an inference of fraud flows irresistibly: *Adams v. Glen Falls Insurance Co.* (1916), 37 O.L.R. 1, per Armour C.J.O. at 16, 31 D.L.R. 166. The Court of Appeal may try the question of fraud: *Kostuk v. National Ben Franklin Fire Insurance Co.*, 60 O.L.R. 56 at 58, [1927] 1 D.L.R. 1145.

A minority shareholder cannot bring directors into Court on every occasion when directors' fees are increased, to have the Court determine the reasonableness of such increase.

A shareholder may vote his shares approving of a benefit to himself: *North-west Transportation Company, Limited et al. v. Beatty et al.* (1887), 12 App. Cas. 589.

A. M. LeBel, K.C., for the plaintiff, respondent: There is no principle of law in dispute, but the facts justify the trial judge's finding of harsh and oppressive treatment of the respondent by the majority shareholders. The Court's refusal to interfere with internal management is subject to the Court's inherent jurisdiction and duty to interfere for the protection of the minority: *Burland et al. v. Earle et al.*, [1902] A.C. 83 at 93; *Cook v. Deeks et al.*, [1916] 1 A.C. 554; *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350. The action of the directors in voting such a substantial part of the profits to themselves for directors' fees was not *bona fide* or for the company's benefit: *Hutton v. West Cork Railway Company* (1883), 23 Ch. D. 654; *Gardner v. Canadian Manufacturer Publishing Co., Limited* (1899), 31 O.R. 488 at 492-3, where Street J. cites with approval *York and North-Midland Railway Company v. Hudson* (1853), 16 Beav. 485 at 499-500. Although in the *Gardner* case, directors were voting all the profits, the principle there laid down applies to the case at bar.

A director owes a duty to the company to see to it that he does not receive too great a remuneration for his services: *Canada Bonded Attorney and Legal Directory Limited v. Leonard-Parmiter Limited* (1917), 42 O.L.R. 141 at 154, 42 D.L.R. 342; Lindley, *Law of Companies*, 5th ed., pp. 363-4.

There can be no suggestion that the respondent was a party to any irregularity. The appellants are bound to explain the large remuneration voted to themselves. The trial judge found a premeditated and carefully calculated arrangement by the appellants to enhance their financial position at the expense of

the respondent. The Court of Appeal should not reverse the trial judge's judgment unless his conclusions are wrong: *Coghlan v. Cumberland*, [1898] 1 Ch. 704 at 705. The onus is on the appellants to satisfy the Court of Appeal that the trial judge was wrong: *Colonial Securities Trust Company v. Massey* (1895), 65 L.J.Q.B. 100.

It is not necessary to show fraud, but is sufficient to find oppressive treatment by the majority: *Waddell v. The Ontario Canning Company et al.* (1889), 18 O.R. 41 at 50; *Masten & Fraser, Company Law of Canada*, 4th ed., pp. 636, 721-2. *Houston v. Victoria Machinery Depot Ltd.*, [1924] 2 D.L.R. 657, 33 B.C.R. 425, may be distinguished. That was a case where only one shareholder was voted a large remuneration as managing director.

J. R. Cartwright, K.C., in reply: The directors may even be paid for their services out of capital if payment is properly authorized: *Re Lundy Granite Company (Limited)* (*Harvey Lewis's Case*) (1872), 26 L.T. 673.

Cur. adv. vult.

20th May 1942. The judgment of the Court was delivered by

MASTEN J.A.:—This is an appeal by the defendants from the judgment of Roach J., dated 21st January 1942, whereby it was directed "that the sums withdrawn by each of the four individual Defendants in the years 1939 and 1940, namely, \$2,000.00 each, in each of those years, shall be repaid by each of them to the Defendant Company [Hotel Belvedere Limited] together with interest thereon from the date of each withdrawal." The judgment also provided for payment by the appellants of the costs of the action.

The action arises out of the disposition by the directors and majority shareholders of Hotel Belvedere Limited, of a portion of the net profits earned by that corporation in the years 1939 and 1940.

The company was incorporated under The Companies Act, R.S.O. 1937, c. 251, and no special or peculiar provisions or limitations bearing upon the questions which arise on this appeal have been pointed out to us as embodied either in the charter or in the by-laws of the company.

The total issued capital stock of the company consists of 500 shares, all fully paid up; 450 of these shares are owned

by the four individual appellants who alone constitute the board of directors, that board having been reduced in number from five to four. The other 50 shares are owned by the plaintiff, who is not a director.

I infer from the evidence and exhibits that hostility exists between the individual appellants and the plaintiff, and that these appellants desire to acquire the plaintiff's shares at as low a price as possible.

In 1939 the net profits of the company, before payment of directors' fees, were approximately \$16,736.84, out of which the sum of \$8,000 was appropriated and paid as directors' fees to the four individual appellants who constituted the board of directors, and a dividend of \$5.00 per share was declared by the company. In that way each of the appellants received \$2,562.50 out of the distribution of profits, and the plaintiff, owning 50 shares, received \$250.

In the year 1940 the net profit before payment of directors' fees was approximately \$22,000, out of which the sum of \$8,000 was paid to the four individual appellants as directors' fees, and a dividend of \$6.00 per share was declared on the common stock. In that way each of the appellants received \$2,675.00, and the plaintiff received \$300, out of the net profits.

The sum of \$2,000 paid to each of the directors in each of the years 1939 and 1940 appears to bear no relationship to the time or attention devoted by the individual appellants to the affairs of the company. The minutes of three directors' meetings held during 1939 and of ten meetings held during 1940 are produced. Apparently these are all that appear in the minute book, though it is suggested in evidence that other meetings numbering as many as one a month were in fact held during 1939 and 1940. Whether such meetings were formal or casual, who were present, whether there was or was not a quorum, is undisclosed in evidence. In this connection it is to be noted that the \$2,000 annual fee was received by each director regardless of whether he attended or did not attend the meetings, also that s. 85 of The Companies Act, R.S.O. 1937, c. 251, provides as follows:

"85. (1) Except as in this section provided no business of a company shall be transacted by its directors unless at a meeting of directors at which a quorum of the board shall be present."

The hotel appears to have been managed most successfully and profitably by the defendant Casey, who was employed as manager at a salary of \$3,600. A perusal of the evidence and of the minutes of the several directors' meetings recorded during the years 1939 and 1940 leads me to the conclusion that the payment of \$2,000 to each of the individual appellants as directors' fees, being at the average rate of more than \$300 per meeting for such meetings as appear in the minute book, bears no reasonable relation to the services of the appellants.

As a result of my perusal of the evidence, and my consideration of the minutes of the directors' meetings during 1939 and 1940, I conclude that the time, attention, and services of the individual appellants as directors during 1939 and 1940 was wholly incommensurate with the fees which they appropriated to themselves, and that it was not permissible for the individual appellants, as directors and majority shareholders, to deal as they did with the assets of the company for their own benefit to the exclusion of the plaintiff, the minority shareholder. In other words, I conclude that the action taken by the individual appellants was a fraudulently oppressive action of the majority as against the plaintiff.

This conclusion, which I reach independently, is in conformity with the findings of the learned trial judge who, after an elaborate review of the evidence records his findings of fact substantially as follows:

"I have not the slightest doubt that all this manœuvring by these four individual defendants is so transparent that anybody can see through it, and that their actions in allotting to themselves these moneys under the heading of directors' fees in 1939 and 1940 was not just a mere mistake in judgment as to the amount which should be paid to the directors of this company, but was a premeditated and carefully calculated arrangement to enhance their financial position at the expense of this plaintiff by acquiring for themselves, under the label of directors' fees, moneys out of which dividends could have been declared which would accrue to the benefit of this plaintiff in proportion to the shares which he held in the company . . .

"I find as a fact, for the reasons already stated, that the actions of these four individual defendants were not *bona fide*; that they were of a fraudulent character; and that they did

thereby abuse their powers and deprive this plaintiff of his rights."

Apart from the above specific findings the trial judge also indicates his conclusion that the individual appellants were "squeezing" the plaintiff with the view of getting his shares at a bargain price.

While it may be true, as indicated by counsel for the respondent, that there is little controversy between the appellants and the respondent respecting the law applicable to the present case, nonetheless it may serve some useful purpose to point out distinctly the particular kind of fraud which the individual appellants have here committed.

The leading case laying down the law which is here applicable, is *Menier v. Hooper's Telegraph Works* (1874), L.R. 9 Ch. 350. In that case James L.J. at p. 353, lays down the law as follows:

"The Defendants, who have a majority of shares in the company, have made an arrangement by which they have dealt with matters affecting the whole company, the interest in which belongs to the minority as well as to the majority. They have dealt with them in consideration of their obtaining for themselves certain advantages. Hooper's Company have obtained certain advantages by dealing with something which was the property of the whole company. The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them."

And in the case of *Cook v. Deeks et al.*, [1916] 1 A.C. 554, Lord Buckmaster L.C., at pp. 564 and 565, speaks as follows:

"Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors

holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. . . . Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier v. Hooper's Telegraph Works*, [*supra*]."

See also the observations of Lord Davey in *Burland et al. v. Earle et al.*, [1902] A.C. 83, at p. 93, and of Lord Macnaghten in *Dominion Cotton Mills Company Limited et al. v. Amyot et al.*, [1912] A.C. 546, at p. 552.

To these observations I would only add the following definition as it appears in Kerr on Fraud and Mistake, 6th ed., at pp. 1-2:

"Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, . . . by which an undue or unconscientious advantage is taken of another" (quoting Story's Equity Jurisprudence, p. 187). And "Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to."

The foregoing statements of facts and law make it plain that the appropriation to themselves by the majority, of the moneys here in question, was fraudulent and that the judgment *a quo* should be maintained and this appeal dismissed with costs.

I should add one further paragraph respecting the question of costs, namely, to suggest that the taxing officer, in dealing with the costs of the action and appeal, carefully consider whether a large portion of the pleadings and of the evidence taken at the trial relating to the earlier dealings of this company are irrelevant, and whether the extra costs so occasioned are properly taxable.

Appeal dismissed with costs.

Solicitor for the plaintiff: Arthur M. LeBel, London.

Solicitors for the defendants: Spencer & Braund, London.

[COURT OF APPEAL.]

County of Lambton v. Village of Point Edward.

Taxation—Municipal Assessment—County Equalization By-law—Procedure—Appointment of Valuers—To What Extent, and for How Long, Valuers' Report to be Accepted—Increase in Amount of Assessable Property—The Assessment Act, R.S.O. 1937, c. 272, ss. 89, 90, 91.

The report of valuers appointed under s. 89(1) of The Assessment Act, R.S.O. 1937, c. 272, does not in all circumstances relieve the county council of its duty to equalize the assessments of local municipalities under s. 90. When, after the report has been made, but during the period for which it is to be made the basis of equalization, there are substantial additions to the assessable real property in a local municipality, it is proper for the county council to take this fact into account in passing its annual equalization by-law, and thereby to alter the relative proportions, as ascertained by the valuers, of the local assessments for purposes of the county rate.

The effect of the provision in s. 89(1) that the valuers' report shall be the basis of equalization "for a period not exceeding five years" is that the county council should itself direct for how long the report should be made the basis, subject to the restriction that the period so fixed must not exceed five years without an extension under s. 89(2). Further, where a valuers' report is made the basis of equalization in 1936, the last year in which it can again be so used, without an extension, will be 1940, and it is not a proper basis for equalization in 1941.

Per Masten J.A.:—The procedure to be followed by a county council in adopting an equalization by-law, and by a county judge on a rehearing, is not complicated. Taking the valuation (if any) theretofore made as a basis or starting-point, they are entitled, and it is their duty, to consider such information as is brought before them as to either accretions and increases in the assessable property in each municipality, or any diminution or lessening in value thereof, bearing in mind the limitation imposed by s. 90, that they shall not reduce the aggregate valuation for the whole county as made by the assessors. S. 90 makes it plain that in performing this function they may increase the aggregate assessment for the whole county, though they may not lower it below the valuation fixed by the assessors.

Per Robertson C.J.O. and Middleton J.A.:—Whether or not the county council has power, under s. 90(1), to equalize business assessments (as to which. *quaere*), the county judge, on appeal, has power to do so under s. 91(8). (*Masten J.A.* preferred to express no opinion on the question of business assessments).

AN appeal by the county of Lambton from the judgment of Miller Co. Ct. J., of the County Court of the County of Lambton, given on an appeal by the village of Point Edward from an equalization by-law of the county.

7th April and 22nd May 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and MASTEN JJ.A.

J. R. Cartwright, K.C., for the appellant: The by-law as passed by the county council should be restored and the judgment of the county judge should be set aside. The county had appointed valuers in pursuance of s. 88(1) of The Assessment

Act, R.S.O. 1927, c. 238 (now s. 89(1) of R.S.O. 1937, c. 272), in 1936, and they had made their report to the county council and the council passed their equalization by-law for 1941 based on this report. This was the proper procedure because the council had previously adopted this report for a further five years as permitted by subs. (2) of the section.

The council, in drawing their by-law, quite properly considered the various changes in real estate values in the village of Point Edward within the preceding five years. The county judge erred in ignoring these changes and in holding that the council was rigidly bound by the valuator's report for the five years subsequent to its adoption. If this judgment were correct there would be nothing the county council could do about equalizing assessments for a five year-period, no matter how great a change might take place in the meantime. On this point the dissenting judgment of Masten J. in *Re Township of Stamford and County of Welland* (1916), 37 O.L.R. 155 at 194-5, 31 D.L.R. 206, should prevail; there is nothing in the majority judgment therein at variance with this. The county judge was wrong in holding that the council could proceed only in an arithmetical way to calculate the proportions of assessment for each municipality, and must not change the aggregate assessment.

John Cowan, K.C., for the appellant: The judge adopted the correct principle in using his discretion to alter some of the business assessments and he should have invoked the same principle to alter the real property assessment. Both the council and the judge are entitled to do this in equalizing assessments.

H. E. Fuller, K.C., for the respondent: The judgment of the county judge should stand. The by-law is bad on its face since the aggregate assessment of the county was reduced below the amount set by the assessors for the year 1940, although the total was retained as shown in the valuator's report of 1936. This is forbidden by s. 90(2) of The Assessment Act. Regardless of the validity of the by-law, the county judge under s. 91(8) of the Act has the power to equalize the assessment for the county and report it to the county council. This was accomplished in this case and the judgment should therefore stand.

J. R. Cartwright, K.C. in reply: The difference between the aggregate assessment in the by-law and that of the assessors was

so small that the principle of *de minimis* should apply. If the council's by-law was correct on the main point these small changes should not affect it. *Dominion Natural Gas Co. v. Walpole Tp.*, [1940] 2 D.L.R. 207 at 209.

Cur. adv. vult.

28th May 1942. ROBERTSON C.J.O.:—This is an appeal by the county of Lambton from the judgment of Judge Miller, Judge of the County Court of the County of Lambton, dated 10th December 1941, on an appeal by the village of Point Edward from the equalization of local assessments in the county made by the county council by its by-law passed on 7th June 1941.

The principal matter with which we are concerned on this appeal relates to the powers of the county council on the equalization of assessments under s. 90 of The Assessment Act, R.S.O. 1937, c. 272, where valuers have been appointed in an earlier year, under s. 89, and have made their report. There is also a question with reference to the equalization of business assessments.

In June 1936 the county council by by-law appointed two valuers to value the real property within the county, as provided by s. 89 of The Assessment Act. In September 1936 the valuers made their report. This report was adopted at a meeting of the county council held on 2nd December 1936, and on 5th December 1936 the county council passed its equalization by-law of that year, based upon the valuers' report. The aggregate valuation of real property for the whole county made by the valuers was \$30,084,500. The valuation of assessable real property in Point Edward was \$324,900. No new valuation has been obtained from the valuers since.

By the equalization by-law passed by the county council on 7th June 1941, from which this appeal arises, the aggregate equalized assessments for the whole county are the sum of \$30,084,500. Business assessments, as well as real property, are included in this. The assessment of Point Edward is equalized at \$600,000. In three other local municipalities there has been some increase in the equalized assessments. In two local municipalities there has been no change, and in the case of all the remaining local municipalities there have been reductions which absorb the increases made in respect of Point Edward and the three other municipalities where there was an increase. The

respondent appealed to the county judge, and the county judge held that the equalization should have been made upon the basis of the valuator's report made in 1936, so far as real property is concerned, meaning thereby that the same proportions should be observed in allotting to each of the respective local municipalities its share of the aggregate real property assessments for the whole county. He also dealt with, and equalized, the business assessments separately. That is a matter that can best be dealt with by itself.

The determination of each of these matters depends upon the proper construction of the relevant provisions of The Assessment Act, and no part of that Act is more obscure and difficult to interpret with any feeling of assurance than the sections that deal with equalization.

Subs. 1 of s. 89, which provides for the appointment of valuers, is as follows:—

“89.—(1) The council of every county may appoint two or more valuers for the purpose of valuing the real property within the county, and it shall be their duty to ascertain in every fifth year at furthest, the value of the same in the manner directed by the county council, but the valuers shall not exceed the powers possessed by assessors, and the valuation so made shall be made by the county council the basis of equalization of the real property for a period not exceeding five years.”

In the opinion of the county judge, when the county council has obtained a valuation under this provision, it “must adopt the valuation of the county valuers as the basis for equalization. . . . They cannot amend it to what they think it should have been and make such amended valuation the basis of their equalization. . . . The word ‘basis’ as used in this section means, and can only mean, the foundation, the whole and only foundation of the apportionment.”

It is not disputed that in the equalization made in 1941 the county council did not proceed as, in the opinion of the county judge, the statute required that it should. It is not entirely clear, however, upon what basis the council did proceed. Evidence was given on the appeal to the county judge with reference to the proceedings of the equalization committee of the council, whose report was adopted and acted upon in passing the equalization by-law, but it does not explain at all definitely

how the amount of \$600,000, at which the assessment of Point Edward was equalized, was arrived at. Certain matters of importance are, however, disclosed that seem to have provided ground, in the opinion of the county council, for its action.

There have been substantial additions to the assessable real property in the village of Point Edward since the valuation made in 1936. An international bridge connecting Point Edward with Port Huron in Michigan, had been constructed, and part of it became assessable in Point Edward, as determined in *Re Michigan State Bridge Commission and Village of Point Edward*, [1939] O.W.N. 387, [1939] 3 D.L.R. 533. The Provincial Legislature, after this decision, by statute fixed the amount of municipal taxes that the Bridge Corporation should be liable to pay annually to the village of Point Edward at \$5,000, but to that extent it is still assessable in respect of the international bridge. There are also certain manufacturing industries in Point Edward that had been granted exemption in whole or in part from taxation for a fixed period, that have since become fully assessable by the expiry of the period of exemption.

Without in any way departing from the valuation made by the valuers in 1936 of what was then assessable in Point Edward, there were these two classes of property which had not been included in that valuation, and yet in 1940 increased substantially the value of the assessable real property in Point Edward. For 1936 the total "value of buildings" on the assessment roll, according to the village clerk's return, was \$366,826. For 1940 the "value of buildings" shown on the roll was \$1,238,357. A large part of the increase was entered on the assessment roll as for property of the Provincial Government, but there still remains a substantial increase attributable to properties upon which taxes were payable to the village. The point at issue would seem to be whether the county council was prevented by the valuation obtained in 1936 from considering this substantial addition to the value of assessable property in the case of Point Edward, in equalizing the real property assessments in the county. The county judge has held that the county council was so prevented.

I have difficulty in giving to the provisions of s. 89(1) the controlling effect that the county judge has attributed to them. S. 90 continues to provide that the council of every county shall, yearly, examine the assessment rolls of the different townships,

towns and villages in the county, for the preceding financial year, for the purpose of ascertaining whether the valuations made by the assessors in each township, town or village bear a just relation one to another, and the county council is empowered to give effect to its opinion in the annual equalization by-law, subject to appeal.

The learned county judge has held that where valuator have been appointed under s. 89(1), and have made their report, the powers that the county council is to exercise each year under s. 90(1) are reduced to the making of mere arithmetical calculations to apportion the aggregate of the real property assessments for the whole county among the several local municipalities in the proportions assigned to them respectively by the valuator's report. The learned judge suggests that "the correct interpretation of the statute would be more clear if, in the arrangement of the statute, s. 89 followed s. 90, as in point of time it did so follow."

It seems to me that it is more important to know that when the original of the present s. 89 was enacted by 29-30 Vict. (Can.), c. 51, s. 175, it was not placed in The Assessment Act at all, but in that part of The Municipal Act that deals with "Officers of Municipal Corporations", such as the clerk, treasurer, assessors and collectors. There it remained for almost forty years and was only translated to its present position as part of The Assessment Act on the revision of The Assessment Act in 1904, as c. 23, s. 80. The present s. 90(1) stood throughout, much in its present form, in its place in The Assessment Act.

No doubt it was the intention that valuator, like other officers of the municipality, should hold office until removed by the council. The provision of s. 89(1) that "it shall be their duty to ascertain in every fifth year at furthest, the value" etc. plainly contemplates a continuance in office for more than the purpose of a single valuation. The by-law of the county of Lambton appointing valuator in 1936, however, contains expressions that seem to limit it to an appointment for that year's valuation, and no more.

In 1866, when the present s. 89(1) had its origin, personal property, as well as real property, was subject to assessment, and when first enacted the section provided that the valuator should value both the real and personal property. In 1873 (36 Vict., c. 48, s. 210) this was changed and the valuation was

confined to real property. The equalization of personal property was directed to be "as heretofore." This also stood until The Assessment Act of 1904, when the assessment of personal property was dropped, and business assessment was introduced.

I do not doubt that it was intended by the Legislature that the valuation made under s. 89(1) should play an important part in the equalization directed to be made yearly by s. 90(1). It is to "be made by the county council the basis of equalization of the real property for a period". But does that necessarily import that the county council shall consider nothing else? Is there nothing more than mathematical calculation left to the council? The county council is required yearly to examine the assessment rolls of the several local municipalities, and if on such examination it should appear that an important and valuable industry has removed from one local municipality to another within the county, thereby gravely disturbing the relation there had been between the respective values of the assessable real estate within them, or if, as here, valuable property that was exempt from assessment and was therefore not included by the valuers in their report, should cease to be exempt from assessment, can the county council do nothing about it? It is difficult to see why The Assessment Act should require, as it has required since 1866, that every county council shall yearly examine the assessment rolls of the local municipalities in the county for the preceding financial year, with no exception made of such county councils as shall have obtained valuations under s. 89(1), if the existence of such a valuation makes the examination of the assessment rolls an empty performance.

In my opinion it is quite possible to give all proper effect to the declaration of s. 89(1) that the valuation shall be made the basis of equalization of the real property, and still retain in the county council the power and duty to bring into the equalization assessable real property that has come into existence since the valuation, as in the case of the international bridge at Point Edward, and real property that was not assessable when the valuation was made and has since become assessable. The valuation still remains the basis of equalization of all the real property that fell within its scope. I see nothing in the statutory provisions that requires any broader effect to be given to the valuation as the basis of the equalization.

The learned county judge has cited the language of Harrison C.J. in *Re Revell and the County of Oxford* (1877), 42 U.C.Q.B. 337, on the effect to be given to the term "the basis." That learned judge was there dealing with a quite different subject-matter, and the term was used in another context, which necessarily affected its interpretation. The question in the case cited was whether the county rate should be apportioned on the basis of the rolls for 1876 or for 1877. Of necessity it could be only one or the other. I have great respect for the opinion of the learned county judge from whose decision the present appeal is taken, but I am unable to agree in his conclusion that the county council exceeded its powers in giving effect to its opinion that the proper equalization of the local assessments in 1941 required that they should increase the assessment of Point Edward, in view of the substantial additions to the assessable real property of that municipality.

There is another ground upon which, in my opinion, the contention that the county council, in 1941, was bound by the report of the valuers, fails. The valuation was made in 1936, and was used in making the equalization of that year. It is true that the valuers' report was not made until September 1936, and the equalization by-law upon which the county rate for 1937 was apportioned, was not passed until December 1936. The statute (s. 89(1)) provides that it shall be the valuers' duty to ascertain the value "in every fifth year at furthest", and that the valuation shall be made the basis of equalization "for a period not exceeding five years". Now, it seems to me that that definition of the period as one "not exceeding five years" lacks somewhat in definiteness. Two years or three or four years would answer it as well as five. It was intended, I think, that the county council itself should direct for how long the valuers' report should be made the basis of equalization, so long as it did not exceed the period of five years without either a new valuation, or an extension of the term under s. 89(2). In the present instance the county council adopted the valuers' report by by-law passed on 5th December 1936, and enacted that the valuation "shall be the basis of equalization of the real property for a period not exceeding five years". These are the very words of the statute, and they have the same lack of definiteness and seem to me to leave the length of the period for which the valuation shall be the basis of equalization,

undetermined. In that case the county council of 1941 was as free as any council to determine the length of the period, and to disregard the valuation, if it so determined.

We are, however, referred to the action of the county council in June 1941. There was an equalization committee, and on 22nd May that committee resolved to report to the council "that we continue the present equalized assessment of \$30,084,500 for the coming five years for the purpose of levying rates against the various municipalities in the county system in the County of Lambton". The committee, by its next resolution, recommended to the council "that at a fixed equalized county assessment of \$30,084,500 for the County of Lambton, Sarnia Township be increased to \$2,347,000, Forest to \$570,000, Point Edward to \$600,000, Thedford to \$160,000, and that benefit of increase be distributed to all other municipalities, except Forest, Sarnia, Point Edward, Thedford, Bosanquet and Plympton, and that a by-law be passed at this session of the Lambton County Council according to the following schedule". There follows a schedule setting forth an equalization exactly as set forth in the equalization by-law that was the subject of appeal to the county judge. The county council adopted the report of the committee on 6th June 1941.

It is argued that by the foregoing the county council extended the time during which the valuation should continue to be made the basis of equalization of the real property, pursuant to s. 89(2).

I do not see how respondent can make that contention. Even if the first of the above-mentioned resolutions, standing alone, were capable of being taken as coming within s. 89(2), when it is accompanied by the second resolution—and the county council adopted the whole report by one motion—it is evident that the county council intended by its action to do the very thing that the respondent says it cannot do in face of the valuation.

It is reasonably plain that the committee and the whole county council as well, misunderstood the whole matter. It seems to have been thought that the figure, \$30,084,500, which was the aggregate value of the real property in the county, as reported by the valuers in 1936, was a total sum fixed for the equalized assessment, no matter what the aggregate valuation for the whole county, as made by the assessors in their

annual assessment, might be. This was in disregard of the express direction of s. 90(1), at its conclusion. It would appear from the inclusion of the two resolutions in the one report that the committee considered that so long as it retained the figure of \$30,084,500, for the aggregate, it was permissible to alter at will the several sums appropriated to the local municipalities that went to make up that aggregate. Further, the committee, by its first resolution, dealt not with the valuation which s. 89(2) authorizes it to deal with, but with "the present equalized assessment". A more complete misunderstanding of the whole matter it would be difficult to achieve. In my opinion it is impossible to regard what was done as anything authorized by s. 89(2). On the contrary, if the respondent's contention is sound, that the county council could not vary the relative proportions determined by the valuers so long as their report formed the basis of equalization, then the action of the county council in June 1941 was a rejection of that valuation as the basis of equalization, just as effectively as if the council had, in express terms, declared that the period in which it should be made the basis of equalization, was determined.

There is still another ground upon which I think it must be held that the period had expired. As it should be computed, the five-year period had elapsed. The valuation was first used as the basis for equalization in 1936. The fifth year in which it was used was 1940. It could not again be made the basis of equalization in 1941 unless the period of five years was extended under s. 89(2), and I have already stated my reasons for thinking that that had not been done.

It was pointed out, however, that the valuers' report was not made until September 1936, and that the equalization by-law for that year which was based upon it, was not passed until December 1936. It is argued that June 1941, when the equalization by-law now in question was passed, is well within the period of five years.

In my opinion the years are not to be computed in that way. An equalization by-law is required by the statute to be passed in each year. The valuers are to ascertain the values "in every fifth year at furthest". The true interpretation of the statute, it seems to me, is that the valuation is to be made the basis of equalization in not more than five years. The precise

date in any year on which the valuation is made or the equalization by-law is passed is not an important matter in the computation of the period of five years. I am of the opinion that on this ground also the county council was not required to make the valuations obtained in 1936 the basis of equalization in 1941.

The matter of business assessments has also to be dealt with. It does not appear clearly how the county council dealt with them, or whether it dealt with them at all. The figure, \$30,-084,500, which the council took as the aggregate of all the local assessments as equalized, was, of course, the amount found by the valuers in 1936 to be the aggregate value of the real property in the county. There were no business assessments included in the valuers' total. The county judge, for the purposes of his order, took the aggregate valuation of real property for the whole county as made by the assessors in the year 1940, and allotted it among the local municipalities in proportion to the respective values found for the local municipalities by the valuers in 1936. He dealt separately with business assessments. He made certain alterations in the total amounts of the business assessments shown on the assessment rolls of the several local municipalities to produce what was, in his opinion, a just relation one to another, and added the amounts so determined for each local municipality to its equalized real property assessment as he had made it.

The only question that is raised with respect to this procedure, so far as business assessments are concerned, is whether business assessments are to be equalized at all, or whether, to comply with s. 98(1), business assessments are simply to be taken as they appear on the assessment rolls of the several local municipalities. No help can be got from s. 98(1) for the word "equalized", where it appears near the end of that sub-section, may be applicable only to the words "assessment of real property", which it immediately precedes, or it may apply also to the words "business assessments", which follow them.

One finds the usual lack of assistance from other sections. S. 93 is an important section, intended to be of wide general scope, yet in directing how the county council shall proceed in apportioning the county rate, it says that the council shall "make the assessment of property equalized in the preceding year the basis upon which the apportionment is made". "Business assessment is not an 'assessment of property' ".—See s. 8.—One turns

to s. 91(4) where the powers of the Court constituted to hear appeals are defined. It provides that "the court shall equalize the whole assessment of the county". This is wide enough to include business assessment, but it is also wide enough to include income assessments which, by s. 98, are definitely excluded.

One must regard s. 90(1) as of prime importance in considering what is to be equalized, for it contains the authority given the county council to proceed to equalize assessments. Unfortunately, the significant word there is "valuations". That is the word used in 1853, when this provision was first enacted, and it has not been altered, although "business assessments" were introduced in 1904. While the valuation of certain occupied parcels of real property is one element in arriving at the amount of business assessment, it is not the only one. A percentage only of the assessed value is taken, and that percentage varies with the character of the business for which the property is occupied. The percentages to be taken of the assessed value of the premises vary from 10 per cent. to 150 per cent. Further, there are substantial reasons for thinking that the Legislature may have intentionally withheld business assessment from the process of equalization by the county council. Business assessments do not lend themselves readily to that process. Each individual business is a case by itself. There can be no generalizing with them, as the statute authorizes to be done in the valuation of real property (see s. 89(3)). To establish a just relation one to another among all the local municipalities in the county, which the statute declares to be the purpose of equalization, must of necessity be an almost hopeless task for the county council in the case of business assessments. Further, it is to be noted that the process of equalization is not in any sense a revision of the local assessment rolls. Notwithstanding the equalization, the individual taxpayer in each local municipality pays according to the last revised assessment roll thereof (s. 98(2)). To increase certain individual business assessments in the process of equalization places a burden on the whole body of ratepayers in the local municipality, that, in fairness, should be borne by a few. This consideration could not be given any weight against the plain meaning of the words of a statute, but in the case of these statutory provisions one can, at best, only grope in the obscurity created by careless drafting. If the decision of the

question arising in the present case in regard to business assessments depended entirely upon the determination of the statutory powers of the county council, I should not be able to arrive at any decision without great doubt. The real question is, however, not in regard to the powers of the county council, but in regard to the powers of the county judge on appeal from the equalization by-law. By s. 91(8) "the judge shall equalize the whole assessment of the county". This provision is not, as is s. 90, limited by its language to the real property, and may well include business assessment. Of course, it will equally include income assessments, but s. 98(1) will apply to exclude them. There is nothing anomalous in giving to the county judge on appeal a wider jurisdiction than that of the county council. In another respect that is done by s. 91(10) with respect to the valuers' report. I would hold, therefore, that the county judge has power on an appeal to equalize business assessments.

In the result the matter should be referred back to the county judge, with a direction that the county council was not required to make the valuation of 1936 the basis of equalization of the real property assessments, and that the county council had power to make such increases or decreases in respect of real property assessment in any of the local municipalities as in their opinion were necessary to produce a just relation between them, but without reducing the aggregate valuation for the whole county, as made by the assessors. This does not deprive the county judge of any of the ordinary jurisdiction given him on such an appeal.

The appellant should have the costs of the appeal to this Court. All other costs are to be in the discretion of the county judge.

MIDDLETON J.A. agrees with ROBERTSON C.J.O.

MASTEN J.A.:—This is an appeal from the order or report of His Honour Judge Miller, Judge of the County Court of the County of Lambton, dated 10th December 1941, made on a re-hearing by him of an appeal by the respondent from the equalization by-law passed by the council of the appellant county in 1941, raising the valuation of the village of Point Edward to \$600,000.

The appeal to the county judge is by way of re-hearing, and the effect of the judge's order is that he vacates and sets aside the allocation theretofore made against the several local muni-

cipalities liable to contribute to the county budget as enacted by the equalization by-law of the county council, and substitutes an allocation based mathematically on the respective percentages of the total county taxes, which were established as a basis by the report of valuers made in 1936. In doing so, the learned county judge declares that on the true construction of the Act the sole and exclusive basis for equalization is the valuers' report of real estate made in 1936, and that the county council has no jurisdiction to vary from the percentages shewn by that report, they being an unalterable basis for the equalization by-law; so that the allocation to the several local municipalities of the percentage of the total county rate which it establishes, becomes merely a mathematical problem.

I think that the learned county judge, in discussing the term "basis" at page 88 of the evidence, has failed to appreciate the real meaning of the words of Harrison C.J. in the case of *Re Revell and the County of Oxford* (1877), 42 U.C.Q.B. 337. The headnote of that case reads as follows:

"The council of a county, in passing by-laws to levy money for county purposes in 1877, apportioned the assessment of the different municipalities, not upon the basis of the value according to the rolls as finally revised and equalized for 1876, but according to the rolls for 1877;

"*Held*, that such by-laws were illegal, being contrary to s. 74 of The Assessment Act 32 Vic. ch. 36, O., and must be quashed."

In my opinion the words of Harrison C.J. in the case above quoted are intended to indicate that the apportionment prescribed by the *equalization by-law* of 1876 was an unalterable basis for the levying of the tax in 1877, and his observation, in my view, has no relation to the method by which, and the consideration on which, the apportionment prescribed by the equalization by-law of 1876 was reached.

The view which was acted upon by the learned county judge is in my opinion an error in law. As long ago as 1916, in the case of *Re Township of Stamford and the County of Welland*, 37 O.L.R. 155, 31 D.L.R. 206, I had occasion to consider a similar question and to state the view which I then entertained respecting the jurisdiction of the county council when enacting an equalization by-law. For all purposes relevant to the present by-law the provisions of The Assessment Act as they then stood

remain unchanged. At p. 194 of the report I expressed my views in the following words:

“ . . . by s. 86, [now s. 90] the county council is given a broad discretion—so broad that it is entitled to take into its consideration the assessment rolls themselves; its own knowledge of values (see s. 88) [now s. 92]; the report of the valuers, if any appointed; and thereupon to form its own opinion as to what is necessary to produce a just relation between the aggregate valuations of the different townships. I think that *prima facie* the actual and true value of the real property should form the basis on which the equalizing valuation is made by the county council.”

I have not had any reason to change the views which I there expressed, and, in my opinion, they are entirely at variance with the principle upon which the learned county judge acted in making the order now in appeal.

If I am right in the view just expressed the process to be followed by the county council in passing an equalization by-law, and by the county judge on a re-hearing, is not complicated. Taking the valuation (if any) theretofore made as a basis or starting point, they are entitled, and it is their duty, to consider such information (as distinguished from oral evidence) as is brought before them, both as to accretions and increases in the assessable property in each local municipality, and also any diminution or lessening in value of the total assessable property in each, bearing in mind the limitation imposed by s. 90 that they shall not reduce the aggregate valuation for the whole county as made by the assessors. I think that s. 90 makes it plain that in performing this function they may increase the aggregate assessment for the whole county, though they may not lower it under the valuation fixed by the assessors.

Under all the circumstances of the present case I find it impracticable to express any opinion respecting the manner in which the question of assessment for business tax was dealt with.

Having had the privilege of reading the reasons of my Lord the Chief Justice since writing the above, I desire to add that I concur in his opinion that the attempted extension of the valuation made in 1936 was ineffectual and that that report was effete and irrelevant as a ground for consideration by the county

judge when considering the local allocations to be made in the equalization by-law of 1942, but I remain of the view that on this record I am unable to deal with the question of business assessment.

For these reasons I am of opinion that the appeal must be allowed and the matter sent back to be dealt with by the learned county judge on the footing above indicated. Costs should follow the result.

Appeal allowed and matter remitted to county judge.

Solicitors for the appellant: Cowan, Gray and Millman, Sarnia.

Solicitors for the respondent: Pardee, Gurd, Fuller & Taylor, Sarnia.

[COURT OF APPEAL.]

Commercial Finance Corporation v. Dunlop Tire and Rubber Goods Company Limited.

Landlord and Tenant—Agreement to Lease—Performance—Time of Beginning of Term—Inability of Lessor to Deliver Possession on Agreed Date—Gratuitous Extension of Time by Lessee—Continued Inability—Rights of Parties.

By agreement in writing, the defendant agreed to lease certain premises from the plaintiff for three years, commencing on 1st November 1940. Certain alterations were to be made in the premises by the lessor, and the lease was to be drawn by the lessor on its usual form, and executed by the lessee as soon as possible after acceptance of the offer to lease. A lease was prepared, but was never executed by either party. On 1st November 1940, the lessor was unable to give possession, both because the alterations were not completed, and because part of the premises was still occupied by another tenant, whose lease did not expire until the following March. On 4th November, a letter was written on behalf of the defendant, informing the plaintiff that unless possession was delivered not later than 11th November, it would consider the agreement as at an end. The alterations were completed before 11th November, but the other tenant did not vacate until 14th November. On 12th November the defendant's solicitor notified the plaintiff that the defendant considered the offer to lease as no longer binding, and requested the return of one month's rent paid as a deposit with the offer to lease. On 15th November the plaintiff's solicitors wrote tendering the keys of the premises, which were then ready for occupation, and undertaking to execute forthwith the lease which had already been settled, "and to make all proper adjustments." This tender was refused on the same day, and the plaintiff sued for damages for breach of contract.

Held, the action could not succeed. There was no question as to whether or not time was of the essence of the agreement. The plaintiff was not ready and willing to perform its part under the agreement on the due date, 1st November 1940, or within the extension gratuitously given by the defendant. The time for commencement

of the tenancy was definitely fixed by the agreement, and by the lease as settled, and the subject matter of that agreement was a lease for three years commencing on that date. What was tendered on 15th November was not a tender of what the agreement called for or what the lease contemplated, and the plaintiff did not even suggest a lease for a three-year term commencing on the date of tender. The fact that the defendant had not executed the formal lease was in no way connected with the plaintiff's inability to perform, and did not preclude the defendant from taking advantage of the plaintiff's default.

AN appeal by the defendant from the judgment of Greene J. awarding damages to the plaintiff for breach of an agreement to lease, and dismissing the defendant's counterclaim for return of the deposit made with its offer. The facts are fully stated in the judgment of Robertson C.J.O.

11th and 12th May 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and MASTEN JJ.A.

J. Shirley Denison, K.C. (*T. D. Delamere* with him), for the defendant, appellant: The agreement to lease, dated 27th September 1940, was for a term of three years, to commence on 1st November 1940. The respondent could not give possession on that date as there was a previous unexpired lease to another tenant. The appellant did not know, and was not advised of, the terms of this lease, and in view of the correspondence, conversations, and draft lease, it is clear that no warning was given that possession would not be available on 1st November. In fact, no arrangement had been made with the tenant, Wilson Motor Bodies Limited, to vacate on 1st November, as it had been advised by the managing director of the respondent's rental agent that it might remain in possession of the premises until 16th November.

Notice was given on 4th November by the appellant to the respondent, demanding possession by 11th November. It was not a duty on the appellant to give the respondent notice to complete its arrangements with the tenant, the Wilson company. There was no default on the part of the appellant. It was able and willing to carry out its part of the agreement: *Stickney v. Keeble et al.*, [1915] A.C. 386 at 395, 398, 400, 418, 423, 426. When a lease is for a short term of three years, time is of the essence of the contract from its very nature. The premises were required for immediate personal occupation: *Clerke & Humphry, Sales of Land*, p. 277; *Gedye v. Duke of Montrose* (1858), 26 Beav. 45; *Tilley v. Thomas* (1867), L.R. 3 Ch. 61.

No discussions between the rental agent for the respondent and the officers of the appellant delayed for even a day the ordering of steel for the alterations.

As the respondent had no title to possession of part of the premises, the agreement to lease was not binding on the appellant: *Forrer v. Nash* (1865), 35 Beav. 167; *Brewer v. Broadwood* (1882), 22 Ch. D. 105; *Lee v. Soames* (1888), 36 W.R. 884; 29 Halsbury, 2nd ed., p. 260, para. 345; and p. 381, para. 523; *Lavine v. Independent Builders Ltd.*, [1932] O.R. 669, [1932] 4 D.L.R. 569.

The appellant was discharged from any liability under its contract by the respondent's breach of it on 1st November 1940, when, instead of giving appellant possession, it permitted the Wilson company to remain in possession until 16th November 1940, without the appellant's knowledge or consent: 7 Halsbury, p. 230, para. 316; *Ford v. Tiley* (1827), 6 B. & C. 325.

This is a pure common law action for damages for breach of contract; there could be no claim for specific performance or equitable relief, as respondent had re-let the premises on 6th December 1940.

The best evidence that the notice given by the appellant was reasonable is that the respondent had made all structural changes by 11th November, the date given in the notice: *Stickney v. Keeble et al.*, [1915] A.C. 386 at 415, 416, 418; *Bernard v. Williams* (1928), 139 L.T. 22; *Lock v. Bell*, [1931] 1 Ch. 35; *Harold Wood Brick Company, Limited v. Ferris*, [1935] 2 K.B. 198.

There is no evidence that the non-execution of the lease by the appellant delayed the respondent. It was a natural and proper precaution on the part of the appellant to wait until the matter of possession was settled.

The appellant obtained other premises after 12th November 1940. No inference of desire to abandon the contract should be drawn from any subsequent arrangement to lease other premises.

R. L. Kellock, K.C., for the plaintiff, respondent: There was no lack of title in the respondent when the agreement to lease was entered into. At that time the respondent had arranged with the Wilson company to vacate by 1st November 1940. Further, the appellant was told of the nature of the tenancy of the Wilson company.

The date, 1st November 1940, was not an essential one. Both parties knew that possession could not be given on that date. Time was not of the essence: 31 Halsbury, 2nd ed., p. 402, para. 471; p. 403, para. 472. There is no express clause in the agreement to lease: Fry on Specific Performance, 6th ed., p. 503, para. 1077; *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* (1915), 32 T.L.R. 156.

The respondent had the option of asking for specific performance or claiming damages at common law. If the contract was subsisting and the respondent had not re-let, the respondent would have the right to specific performance. The respondent minimized the damages by re-letting, but that does not affect the right to damages at common law. Equity still applies to determine whether the contract was in force at the later date.

[ROBERTSON C.J.O.: If the action is one at law, then there is no room for equitable considerations.]

The appellant was not in a position to insist on having possession on 1st November. The appellant was aware that the respondent could not obtain possession from the Wilson company by that date. The respondent was required to make alterations for the appellant, and the latter knew that the work would not be completed by 1st November.

If 1st November 1940 ever was the date for possession, the appellant waived its rights to have possession on that date. The appellant requested and the respondent agreed to erect a fire escape. The parties agreed to this on 25th October, and the appellant knew the work could not be completed until 5th November.

As regards other alterations, the architect of the appellant was on the premises on 6th November giving instructions.

The notice given by the appellant on 4th November, setting 11th November as the time when all alterations were to be completed and possession given, was not reasonable in the circumstances. On 4th November, the respondent did not know whether it would be able to have the work completed by 11th November. The appellant fixed a purely arbitrary time limit, without regard to the circumstances. By a fortunate chance, the respondent did obtain and have the work done by 11th November. The reasonableness of the notice must be judged from the circumstances at the time the notice is given, and not by subsequent fortuitous circumstances: *Crawford v. Toogood* (1879), 13 Ch. D.

153, at 158. Actually, the notice was for less than five days' time, as 10th November was a Sunday, and the 11th was a holiday.

As the respondent was not guilty of unreasonable delay up to 4th November, the appellant had no right to serve a notice making time of the essence: *Long v. Eby* (1902), 1 O.W.R. 420; 31 Halsbury, p. 403, para. 472; 3 Halsbury, p. 221, para. 378. Even if the steel had been delivered on the 4th November, it would have taken two weeks, working normally, to complete the work.

The appellant was in default, and therefore the appellant cannot charge the respondent with default. The appellant had not executed the lease, although that was to be done as soon as possible after the date of the agreement to lease: *Foster v. Anderson* (1907), 15 O.L.R. 362 at 371-2, affirmed 16 O.L.R. 565 at 570, 574; *Brickles v. Snell*, [1916] 2 A.C. 599 at 605; *Stickney v. Keeble et al.*, [1915] A.C. 386 at 418-9, 423; *Morris v. Baron and Company*, [1918] A.C. 1 at 9; *Consolidated Press Ltd. v. Gibson et al.*, [1933] O.R. 458, [1933] 3 D.L.R. 64; *Rice v. Knight* (1920), 18 O.W.N. 393 at 394; *Upperton v. Nickolson* (1871), L.R. 6 Ch. 436 at 443.

Cur. adv. vult.

28th May 1942. ROBERTSON C.J.O.:—This is an appeal by the defendant from the judgment of Greene J., dated 24th June 1941, awarding the plaintiff \$1,803.35 damages for breach of an agreement for a lease, and dismissing the defendant's counterclaim. A statement of some of the facts is essential.

An agreement in writing, dated 27th September 1940, was made between the parties, whereby the appellant agreed to lease from the respondent part of a building known as the "Rumely plant" in Toronto, consisting of a basement and the three floors above it, at a rental of \$7,500 per year, payable \$625 monthly in advance. The lease was to be for a term of three years from 1st November 1940, to 31st October 1943, and was to be drawn by the lessor on its usual form, and executed by the lessee as soon as possible after acceptance of the offer to lease. The agreement provided that the lessor should make certain alterations to the premises, and at least some of the alterations were substantial and important. The lessee was to be allowed to move into the two top floors before 1st November

1940, if found necessary, and "to pay pro rata rate for space occupied."

A formal lease was prepared and settled between the parties and was ready for execution by 26th October 1940, as appears by a letter of that date from the respondent's managing director to the appellant's solicitor. The appellant did not, however, execute the lease.

When 1st November arrived the premises were not available for occupation by the appellant. Not only were the alterations that the respondent was making unfinished, but another tenant of the respondent, having a prior lease the term of which had not expired, was still in occupation of the first floor. There was some discussion between the parties, and on 4th November the appellant's solicitor wrote to the respondent's vice-president advising him that, without prejudice to such rights as his client might have under its offer to lease, unless the alterations to the building were completed and his client was able to take full possession on or before 12 o'clock noon on Monday, 11th November 1940, it was its intention to proceed no further with the matter, and to make other arrangements.

The alterations to the building were completed by 11th November, and so far as they were concerned there was nothing to prevent the appellant being given possession on that date, as it had demanded. The respondent could not give possession on that date because its other tenant was still in occupation and had the right to be there.

On 12th November the appellant's solicitor notified the respondent that his client regarded its offer to lease the premises in question as no longer binding on it, as possession had not been delivered pursuant to the letter of 4th November. He requested that the cheque for \$625, which the appellant had delivered with its offer to lease, as the first month's rent, should be returned. On 15th November the respondent wrote the appellant's solicitor tendering the keys of the premises, and offering to execute forthwith the lease that had been settled and "to make all proper adjustments". On the same day the appellant's solicitor wrote the respondent's solicitor refusing the tender so made. After a letter from the respondent's solicitor threatening action if the appellant did not change its attitude, this action was brought by the respondent claiming damages for the alleged breach by the appellant of the agreement to lease.

In the view I take of this case the respondent was not ready and willing to perform the agreement on its part when performance was due, by giving the appellant possession, and therefore it can have no claim against the appellant for damages for breach of the agreement. See "Selections from Williston on Contracts", rev. ed., p. 713.

Much has been said in this case upon the question whether time was of the essence of the agreement to lease. The learned trial judge based his judgment primarily on a finding that time was not of the essence. With great respect, that question does not, in my opinion, arise in this action. Quite apart from any question as to whether the rule of equity in regard to stipulations as to time, has any application where the plaintiff merely sues for damages for breach of contract—as to which see *Stickney v. Keeble*, [1915] A.C. 386 at p. 416 and *Lavery v. Pursell* (1888), 39 Ch. D. 508 at p. 519—the nature of this agreement and the conduct of the respondent exclude any contention that the time for the commencement of the term was not definitely fixed by the agreement, but was subject to variation without further agreement of the parties. The only times mentioned in the agreement are the length of the term and the time for its beginning and the time for its ending. The subject matter of the agreement is a lease of the premises mentioned "for a term of three years from November 1st, 1940 to October 31st, 1943". The only other mention of the date, November 1st, 1940, is in a clause that reads, "Possession of premises is to be given us not later than November 1st, 1940", and in a provision in the nature of an option to the lessee to move into the two top floors before 1st November 1940, if found necessary, and for this, payment was to be made "for space occupied".

The respondent has made it very plain that it considered 1st November 1940, a fixed date for the commencement of the term, for, as expressed in the lease which it prepared, and which, by its letter of 15th November 1940, it tendered in performance of the agreement, the appellant is "to have and to hold the said demised premises for and during the term of three years to be computed from the 1st day of November, 1940, and from thenceforth next ensuing and fully to be complete and ended on the 31st day of October, 1943". In my opinion the tender of that lease on 15th November, with possession, was not a good offer of performance of the agreement on the part of the respondent.

It is true that by the same letter the respondent undertook to make all proper adjustments. That, however, only tends to make it the more plain that the tender on 15th November of a lease for a term stated to commence on 1st November, was not a tender,—and the respondent recognized that it was not a tender—of that which the agreement called for. If the time mentioned in the agreement for the commencement of the term was not of the essence of the agreement, and some later date would do, then one would have looked for the tender of a lease for a term to commence on the date of tender of possession, and continuing for a full three years from that date. It seems to me that the respondent cannot consistently contend that 1st November was a date fixed by the agreement for the commencement of the term, and that the date could not be varied, and at the same time say that the time for giving possession was not of the essence. This ignores the essential nature of a demise, which carries with it the right to exclusive possession. The tender made on 15th November was not a tender of that which the agreement called for, nor of what the lease described.

It was through no fault of the appellant that the respondent's tenant remained in occupation until 14th November. The appellant had nothing to do with that occupation, and was not even kept fully informed as to the position from time to time. When, in September, the appellant inspected the premises before making the agreement for a lease, the respondent's tenant, Wilson Motor Bodies Limited, was in possession of the first floor, and there were other tenants on the second floor and a tenant in the basement. The officer or agent of the respondent who exhibited the premises for inspection says that he explained to the appellant "the nature of the tenancies". This witness, however, according to his evidence, was under the impression that "the first floor was occupied by tenants, but arrangements had been definitely made and completed to provide for space for those tenants". It would appear, however, that in fact the respondent's arrangements with Wilson Motor Bodies Limited were not as complete as was thought. This tenant held a lease that was good to March 1941. All that was in writing relating to any change in their occupation was in the form of an offer from Wilson Motor Bodies Limited to lease a certain other part of the same building. This offer was, however, expressly subject to a proviso that the then present tenant of the premises

mentioned in the offer, should vacate. There was nothing whatever in the offer, or for that matter in writing anywhere else, in reference to the Wilson Company giving up possession of the premises they then occupied, to allow another tenant in on 1st November 1940, or at any other time before the expiry of its lease in March 1941. Whatever understanding there may have been between the respondent and the Wilson company with respect to the latter vacating the premises promised to the appellant for 1st November, there was nothing in writing about it, and the respondent does not appear to have been in any position to compel the Wilson company to vacate. On 1st November 1940 the respondent's managing director wrote the Wilson company to confirm an understanding they had regarding some variations in the new lease the Wilson company was to have, and in this letter he said, "You are to give up possession of the first floor, East Wing, at present occupied, at the earliest possible date, not later than November 16th, at which time we will have the new space available with the exception of the steel work". Nothing of this was communicated to the appellant, and in fact the appellant did not learn the real position as between the respondent and its tenant, Wilson Motor Bodies Limited, until it was disclosed in the course of the proceedings in this action.

It is contended for the respondent that any delay in making the premises available for the appellant's occupation was excused by reason of the fact that alterations in the premises that the respondent had agreed to make were not completed, and were in fact delayed in completion by the addition, by mutual agreement, of further alterations. The respondent says it proceeded with all due expedition, and that it was through no fault on its part that the work was not all done to permit of occupation on 1st November. It is plain that the respondent failed to protect itself against the consequences of unforeseen delays, both when making the original agreement and when undertaking additional work. It is not necessary, however, to further investigate either the causes of that delay, or the consequences of it. By its solicitor's letter of 4th November 1940, the appellant gave the respondent until 12 o'clock noon on 11th November to let it into possession. All the work that the respondent had to do upon the premises was in fact completed by that time. It was not delay in completing the alterations that prevented the re-

spondent tendering possession at a time when it would have been accepted.

The respondent's counsel says, however, that the extension of time to 11th November was not a reasonable extension under the circumstances. This is a contention that it might be necessary to consider if this were a case where time was not originally of the essence of the contract, and the appellant's letter of 4th November had been written for the purpose of making time of the essence. But that was not the position. Performance was due on 1st November. By its letter of 4th November the appellant gratuitously offered to accept a delayed possession, reserving its rights if possession was not given within the extended time. The appellant could make the extended time as long or as short as it pleased. The respondent had no status to complain. The position is not unlike that dealt with in such cases as *Ogle v. Earl Vane* (1868), L.R. 3 Q.B. 272, and *Levey and Company v. Goldberg*, [1922] 1 K.B. 688.

It is further argued for the respondent that the appellant is not entitled to set up default on the part of the respondent in tendering possession at the time agreed upon, because the appellant was itself already in default in not having executed the formal lease as soon as possible after acceptance of its offer, as required by the agreement. It would appear by the respondent's letter of 26th October that the form of lease had then been agreed upon, and the appellant was requested to execute it. The lease was not in fact signed by either party at any time. There is nothing, however, that suggests that there was any connection whatever between the failure to execute the lease and the delay in giving possession. There was no request for the execution of the lease between the respondent's letter of 26th October and its letter of 15th November tendering possession. The execution of the lease by the appellant would not have hastened by one moment the vacating of the premises by the tenant in occupation. In any event the infirmity is in the respondent's case—not in the appellant's. The respondent was not ready and willing to perform the contract on its part, and cannot have damages.

There remains for consideration the appellant's counterclaim. The appellant had paid the respondent \$625 for the first month's rent, with its offer to lease. It seeks to recover back that sum, which the respondent has applied in reduction of its total claim

for damages, amounting to \$2,306.50. The appellant is clearly entitled to the return of this sum.

The appeal is, therefore, allowed and the action is dismissed with costs. The appellant is entitled to judgment on its counterclaim for \$625 and costs, and to the costs of the appeal.

MIDDLETON J.A. agrees with ROBERTSON C.J.O.

MASTEN J.A.:—Having had the privilege of reading the reasons of judgment prepared by my Lord the Chief Justice, I concur in his conclusion that the appeal must be allowed, and judgment granted in favour of the appellant on its counterclaim, both with costs; but I desire to add certain observations.

The action is a common-law action for the alleged breach by the appellant of a contract relative to the taking of a lease, and the counterclaim of the appellant is for the return of moneys paid by it in anticipation on account of rent.

The claim of the respondent, as set forth in the statement of claim is as follows:

"Rent November 15th to December 6th	\$ 410.00
Cost of fire escape	215.00
Extra cost of sprinkler	136.50
Painting exterior of building	450.00
Extra cost of steel work	400.00
Sealing fire doors	20.00
Commission on reletting	675.00
	<hr/>
	\$2,306.50
Less cheque from defendant	625.00
	<hr/>
	\$1,681.50"

By its counterclaim the appellant claims, "Return of the sum of \$625.00 paid to the plaintiff on September 27th, 1940", as well as other relief.

The contract originated in an offer made by the appellant to the respondent and accepted by it. The offer is dated 27th September, 1940, and is in the terms following:

"OFFER TO LEASE

September 23rd, 1940.

"I hereby offer to lease from the owner, Lessor,

COMMERCIAL FINANCE CORPORATION
LIMITED

through.....Chambers and Meredith Limited.....

Agents the premises known as the easterly portion of the Rumely Plant at 48 Abell Street, Toronto; consisting of three floors and a basement, comprising approximately 30,000 square feet.

for a term of three (3) years,

from November 1st, 1940 to October 31st, 1943; at a rental of Seventy-five Hundred (7,500.00) Dollars per year, payable Six Hundred & Twenty-five (\$625.00) monthly in advance, the first of such payments to be made to the Commercial Finance Corporation on the signing of this offer, to apply as a deposit on rental and to be returned if offer not accepted.

"Possession of premises is to be given us not later than November 1st, 1940. Lease to be drawn by Lessor on Lessor's usual form and executed by Lessee as soon as possible after acceptance of this offer.

"This offer upon acceptance shall constitute a binding contract and the parties hereto agree to execute a lease containing the ordinary provisions and conditions when the same has been prepared.

"THE LESSOR is to supply heat, and watchman service.

"THE LESSEE is to pay for own electric light and power.

"THE LESSOR is to make the following alterations to the premises:—to paint the whole exterior of the building; to take out all partition and whitewash the whole interior (same as the top floor); and to reglaze any broken windows; to use some of the partition material now on the premises to form an office on the ground floor, said partition to run east and west about 25 ft. south of north wall, with door into back space. A door is to be cut into present stair well, so that entrance can be had to basement from rear portion of ground floor.

~~"A SPRINKLER SYSTEM is to be installed throughout the building, and the second floor strengthened throughout, so that floor will be capable of standing a live load of 125 pounds to the square foot.~~

'J.I.S.'

"LESSOR is to alter the elevator gates, so that they comply with the by-law as to safety, etc.

"LESSEE is to be granted permission to erect a loading platform on the east side of the building at their own expense, and to erect a sign or signs on the building—design and position to be approved by the Lessor."

"Commercial Finance Corporation Limited,
Sterling Tower,
TORONTO, Ontario.

"Attention Mr. Chas. Bauckham, President

"Dear Sirs:

I am instructed by my clients, The Dunlop Tire and Rubber Goods Company Limited, to advise you that they regard the offer to lease premises known as No. 48 Abell Street, Toronto, dated September 27th, 1940, as no longer binding on them, as you have not delivered vacant possession to them, pursuant to my letter to your Company of November 4th last. Be good enough to let my clients have a cheque for \$625.00, being the amount paid by way of deposit on September 27th last.

"Yours very truly,

"D. Robinson."

Each party blames the other for failure to complete.

The respondent company denied the right so asserted by the appellant. If its denial was warranted it had the option either to bring an action for specific performance, or to treat the contract as discharged for all purposes, except that of bringing an action for the breach of it. It chose the latter alternative, and the question for determination by the Court is whether there was or was not such a breach of the contract on the part of the respondent as to warrant the appellant in declining to be any longer bound thereby.

On 27th September 1940, certain of the premises in question were to the knowledge of both parties occupied by Wilson Motor Bodies Limited, under a lease from the respondent company. This lease entitled the lessee to occupy the premises until March 1941. It thus became essential that the respondent should arrange with the Wilson company to terminate its right of occupation and possession on or before 1st November, so that the respondent on that date could give to the appellant possession in accordance with the terms stipulated for in the contract.

I think that it is immaterial whether the appellant knew or did not know the particulars of the Wilson lease, for the respondent undertook absolutely to convey to the appellant a leasehold term running from 1st November 1940, to 31st October 1943, carrying with it exclusive possession of the whole of the premises in question from 1st November 1940.

On 1st November 1940, and for some time thereafter, the respondent was unable to fulfil the terms of its contract. The alterations which it had undertaken to do were not completed until 11th November, and the Wilson company were in actual lawful possession under their lease until 14th November. Thereby the respondent by its failure to clear the premises from possession by the Wilson company, and its failure to place the appellant in possession of the premises with the agreed alterations duly completed made the complete performance of the contract impossible, for the term ran from 1st November 1940, and part of it had expired before possession could be given.

That was the position on 1st November 1940.

On 4th November 1940, Mr. Robinson, solicitor for the appellant, wrote to H. R. Frost, K.C., as vice-president of the respondent company, limiting a time within which possession was required to be given. The letter is in part as follows:

"The alterations to the premises have not been completed as of this date, nor have we been able to take possession of any part thereof. In fact, there is at present a former tenant still occupying a portion of the building and it would appear that it will be some time before my clients will be able to occupy the said premises.

"Accordingly, I must advise you that, without prejudice to such rights as my clients may have under the offer to lease, unless the alterations to the said building are completed and my clients are able to take full possession on or before twelve o'clock noon, Monday, the 11th day of November, 1940, it is my clients' intention to proceed no further with this matter and to make other arrangements.

"Yours very truly,

"D. Robinson".

No doubt this letter had the effect of gratuitously extending the time for delivery of complete possession until 11th November, and by that date the stipulated alterations had been completed, but the Wilson company was still in lawful possession. The extension was conditional on complete fulfilment on or before 11th November, and on failure by the respondent to complete on that date the rights of the appellant reverted to the position in which they stood on 1st November. This point has been fully

discussed in the reasons of my Lord the Chief Justice, and I can add nothing to what has fallen from him.

As to the respondent's submission respecting time being of the essence of the contract, I concur in the observations of my Lord, and would only add the following.

Whether the damages which the respondent seeks to recover are in substitution for specific performance, or are independent of it, is immaterial. In either case the respondent is debarred from recovery because by reason of its own failure to deliver possession on 1st November, it has made the fulfilment of the contract impossible. In other words, the respondent's difficulty may, I think, be stated in a single sentence. The subject matter of the contract sued on is a specific term beginning on 1st November 1940, and in consequence of the respondent's own failure, without fault on the part of the appellant, to give possession on that date, fulfilment of the contract became impossible and enabled the appellant to say it was no longer bound on its part.

In the course of his judgment the learned trial judge says, "On the authorities cited I am very strongly inclined to the view, as a matter of law, that the defendant being in default in regard to the execution of the lease which had been settled it had no right to give notice on November 4th until such default had been repaired and a tender made of the lease duly executed."

With great respect I am unable to agree with the view so expressed, and I concur in what has fallen from my Lord the Chief Justice with respect to that phase of this appeal. The true position was that both parties were firmly bound up to 1st November, just as much as if the lease had been executed, and on 1st November the respondent broke the contract in an essential and fundamental feature by failing to deliver possession.

A consideration of all the facts and circumstances disclosed may give some ground for concurrence in the suspicion expressed by the trial judge that the appellant had on further consideration and inspection of the premises concluded that they were less advantageous than had been expected, and was not unwilling to get out of the bargain if it could legally do so. But where the appellant comes to the Court asserting its legal rights, the Court is bound to accord such rights according to law and uninfluenced by suspicion.

For these reasons I concur in the disposition of this appeal as proposed by my Lord the Chief Justice.

Appeal allowed with costs and action dismissed with costs; judgment for the defendant on the counterclaim, with costs.

Solicitors for the plaintiff, respondent: Mason, Foulds, Davidson & Kellock, Toronto.

Solicitor for the defendant, appellant: Douglas Robinson, Toronto.

[HOGG J.]

Re Farrow Estate.

Insurance—Life—Borrowing on Policy—Consent of Wife—No Covenant or Agreement by Insured to Repay—Widow Not Entitled to Rank as Creditor of Insured's Estate for Amount of Loan, Deducted by Insurer from Proceeds—The Insurance Act, R.S.O. 1937, c. 256, ss. 156, 163, 165.

Where an insured borrows money on the security of his policy, and the loan agreement contains no promise to repay the loan, but merely provides that the borrower may repay it with interest at any time, and that the insurer, in settling any claim under the policy, shall be liable only for the balance owing after deducting the amount of the loan and interest then outstanding, the widow of the insured, having, as sole beneficiary under the policy, consented to the loan, will not be entitled to rank as a creditor of the insured's estate for any amount deducted by the insurer from the proceeds of the policy. The foundation of the rule laid down in *Hudson v. Carmichael* (1854), Kay 613, and *Hall v. Hall*, [1911] 1 Ch. 487, and applied in *Green v. Standard Trusts Co.* (1912), 22 Man. R. 397, 1 D.L.R. 609, 1 W.W.R. 993, 20 W.L.R. 488, is that the wife has pledged her property to secure a personal obligation of her husband, and here, although the insurance moneys are, in equity and by virtue of s. 156 of The Insurance Act, R.S.O. 1937, c. 256, the wife's property, yet the insured, not having agreed to repay the loan, is under no personal liability, and there is therefore no debt of the husband for which the wife's property has been pledged.

AN appeal by the widow of Alvin George Farrow, deceased, from the certificate of O. E. Lennox Esq., Assistant Master, disallowing her claim to rank as a creditor of the deceased's estate, which was insolvent and was being administered by the Court. The facts are fully set out in the judgment.

7th January 1942. The appeal was heard by HOGG J. in Weekly Court at Toronto.

R. I. Ferguson, K.C., for the widow, appellant.

A. M. Ferriss, for the creditors of the estate, respondents.

30th May 1942. HOGG J.:—This is an appeal made on behalf of Mrs. Alberta Farrow, widow of the late Alvin George Farrow, deceased, from a certificate of Mr. O. E. Lennox, Assistant Master, dated the 16th December 1941, which disallows the claim of Mrs. Farrow to rank as a creditor of her husband's estate in the sum of \$3,607.42, being the sum claimed by her in repayment of an amount deducted by the Equitable Life Insurance Company of Canada from the proceeds of a life insurance policy upon the life of her deceased husband for \$10,000.00. Mrs. Farrow was named in the policy as beneficiary of the proceeds thereof, and was the beneficiary at the time of the death of her husband. The application to the Assistant Master was opposed, and the appeal from his certificate is opposed, by the creditors of the estate of the late Mr. Farrow.

Mrs. Farrow stated in an affidavit made by her for use on the application, that shortly before her husband's death she consented to her husband obtaining a loan of \$3,607.42 from the insurance company upon the security of his said life insurance policy.

In order to secure the loan, the late Mr. Farrow entered into an agreement in writing with the insurance company, embodied in a printed form of the company, called a policy loan agreement. The agreement sets out, *inter alia*, that the insurance company, in settlement of any claim under the policy, shall be liable for the balance only of the proceeds of the policy after deducting the amount of the loan and interest thereon. A further term of the loan agreement is that the borrower may repay the loan with interest at any time. The loan agreement is signed by the late Mr. Farrow, and by his wife, described as the beneficiary. There is no covenant or promise in the agreement, by the borrower or by the beneficiary, to repay the loan.

By s. 156 of The Insurance Act, R.S.O. 1937, c. 256, it is provided that when the insured designates one of the class of preferred beneficiaries as the beneficiary of the proceeds of the policy, a trust is created in favour of such beneficiary. A statutory trust was therefore created when Mrs. Farrow was named in the policy as a beneficiary, she being within the preferred class. Furthermore, this section provides that the insurance money shall not, except as otherwise provided by the statute, be subject to the control of the insured or his creditors, or form part of his estate, and so long as an insurance policy, where a

preferred beneficiary has been designated by the insured as the recipient of the insurance moneys upon the maturity of the policy, is kept in force by the insured, the proceeds of the policy are payable on maturity to such beneficiary.

The insurance moneys constitute a trust fund in the hands of the insurer of which the beneficiary is the owner in equity: *National Life Assurance Company of Canada v. McCoubrey*, [1926] S.C.R. 277, [1926] 2 D.L.R. 550.

S. 165(1) of The Insurance Act, provides that a preferred beneficiary of full age and the insured may surrender, assign, or dispose of the insurance contract absolutely or by way of security to the insurer, or to any other person. This subsection is subject to s. 163, which enables an insured, where a preferred beneficiary is designated, to borrow from the insurer on the security of the policy such sums as may be necessary to keep it alive without the concurrence of the beneficiary.

Subs. 4 of s. 165 sets out in part, that "Where a contract has been assigned as security for any loan or debt the rights of any beneficiary, whether ordinary or preferred, under such contract shall be affected only to the extent necessary to give effect to the rights of the assignee". This subsection was enacted in 1935 by c. 29, s. 19.

It is therefore to be concluded that any rights which might exist with reference to the insurance policy or the proceeds of the same, as between Mrs. Farrow, the preferred beneficiary under the policy, and the insured, her husband, would not be affected by the fact that she had consented to her husband borrowing the sum above-mentioned from the insurance company upon the strength of the insurance policy as security; all rights of the preferred beneficiary granted by s. 156 of the statute would be preserved, subject only to the right of the insurance company to repayment of the amount of the loan.

If this view is correct, it could not be argued that Mrs. Farrow in any way modified or varied the terms of the trust in her favour created by the statute, except in so far as the insurance company would have the right to recoup itself from the proceeds of the policy for the amount of the loan.

Mrs. Farrow sets out in her affidavit that the reason why her husband borrowed the amount stated from the insurance company and gave the insurance policy as security, was that he

needed money. There is no evidence that any part of the moneys borrowed were used for the benefit of Mrs. Farrow.

It was argued on behalf of the appellant that the equitable principle set out in *Hudson v. Carmichael* (1854), Kay 613, and followed by Warrington J. in *Hall v. Hall*, [1911] 1 Ch. 487, was applicable to the facts here present.

In *Hudson v. Carmichael* the judgment of Lord Hardwicke L.C. in *Kinnoul (Earl of) v. Money* (1767), 3 Swans. 202n., is referred to, where that outstanding equity judge said:

"I differ entirely from the Plaintiff's counsel, who say it is incumbent on the Defendant to shew that the money was borrowed for the benefit of the husband; for the general rule is, that where a husband borrows money on the security of the wife's estate, as the money is under his power, it is supposed to come to his use; and this turns the proof on him to shew the contrary. This Court *prima facie* considers it as a pledge for the husband's debts; and his estate shall first be applied to exonerate it, unless a special case appears."

In *Re Caulfeild* (1930), 37 O.W.N. 380, the judgment of Mr. Justice Hugh T. Kelly is to the effect that where a policyholder borrowed a sum of money upon the security of his policy and afterwards named his wife by declaration as the sole beneficiary of the proceeds of the policy, and where according to the loan agreement made between the policyholder and his insurance company, the husband was under no legal personal obligation to repay the amount of the loan, such amount could not be included in the debts which the executors under the will of the deceased policyholder were required to pay, and the widow took the insurance moneys subject to payment thereout of the loan and interest. In that case, which was upon an application for an order to determine certain questions arising in the disposition of the estate of the policyholder, the widow was not a beneficiary under the policy when the loan was secured by her husband, and the equitable principle considered in *Hall v. Hall*, *supra*, did not arise.

In the case now under consideration there is no doubt that under the terms of the loan agreement Mr. Farrow did not render himself personally liable to repay the loan he obtained from the insurance company.

The insurers repaid themselves the amount of the loan from the proceeds of the policy, as they had a right to do, and as a

result it was only the balance of the proceeds of the policy less the amount of the loan, which the insurance company was under obligation to pay to Mrs. Farrow, the preferred beneficiary. The question, as I see it, in this appeal is, it being a fact that neither Mr. Farrow nor his estate was indebted in any way to the insurance company, whether his estate is indebted to his widow and whether she has a claim against the estate for repayment of such debt.

Upon a perusal of the judgments in *Hudson v. Carmichael*, *supra*, and *Hall v. Hall*, *supra*, it will be seen that where a wife concurs with her husband in pledging her property to obtain a loan, and the husband covenants to repay the debt and is, therefore, under a personal obligation in this respect, and there is no evidence that the wife received the benefit of the proceeds of the loan, the wife is a surety for her husband and has the right to have the debt paid off out of the husband's assets.

The equitable doctrine is founded upon the fact that there is a debt of the husband for which the wife has made herself a surety with respect to her separate property.

The case of *Green v. Standard Trusts Co.* (1912), 1 D.L.R. 609, 22 Man. R. 397, 1 W.W.R. 993, 20 W.L.R. 488, in the Court of Appeal of Manitoba has been cited by counsel for the appellant in support of the contention that Mrs. Farrow is entitled to rank as a creditor upon her husband's estate. The facts are similar to the matter now under consideration except that both the wife and her husband covenanted to repay the loan obtained by the husband from the insurance company upon the security of his life insurance policies.

Howell C.J.M. stated that under the Manitoba Insurance Act, as well as the Ontario statute of 1897 (R.S.O. 1897, c. 203), a trust was created in favour of the beneficiary, and the plaintiff, the beneficiary, became the owner of the fund represented by the insurance policies, and at page 613 (D.L.R.) the learned Chief Justice said:

"The plaintiff's position is that parts of the funds payable to her under these policies have been diverted to pay the debts of the deceased; because the deceased had not paid his debts her property has been charged with the payment of them."

The conclusion reached is that the estate of the deceased husband should make good to the widow the sums retained from her by the insurance company.

Perdue J.A. at p. 620 (D.L.R.) expressed his opinion in the following language:

"The loans effected by the testator upon two of the policies payable to his wife were made for his benefit. Although the plaintiff joined with him in pledging the policies as security for the loans and signed promissory notes jointly with her husband for the amounts borrowed, all the proceeds of the loans were paid to the husband and she received no part of them. These loans should be paid out of the testator's estate not specifically devised."

Among other authorities referred to in support of this opinion is the case of *Hall v. Hall*, *supra*.

I think the application of the equitable principle which has been under consideration cannot, upon the authority of the two judgments in the cases which have been hereinbefore discussed, be applied in the present appeal in favour of the appellant, Mrs. Farrow, because of the fact that her husband was not indebted to the insurance company to repay the loan received by him from the company. She did not pledge her property as security for a debt of her husband.

It is true that Mrs. Farrow consented to allow property of which she was the equitable owner to be rendered liable to repay the amount of the loan received by her husband. But as he was not under any personal obligation to repay the amount of this loan, I cannot hold that she has a claim in respect of the amount of the loan against her husband's estate. At the time she signed and consented to the loan agreement, she was aware, or should have been aware from its terms, that her husband did not become personally indebted to the insurance company.

The appeal from the Assistant Master's certificate is dismissed. I think, in the circumstances, the costs of the creditors should be paid by the estate, as well as costs of the appellant, fixed at \$75.00.

Appeal dismissed.

Solicitor for the widow, appellant: E. A. R. Newson, Toronto.

Solicitors for the creditors, respondents: Garvey & Ferriss, Toronto.

[HOGG J.]

General Securities Corporation Limited v. Hynes and Brousseau.

Bills of Sale—Validity—Non-registration—What Constitutes Actual and Continued Change of Possession—The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, s. 8.

It is essential, under s. 8 of The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, that, if a bill of sale is not registered, there should be, as between the parties to the sale, an actual and continued change of possession. Where there is no such change of possession it is wholly immaterial that a creditor of the seller is aware of the change of ownership, and he will be able to set up the invalidity of the bill of sale notwithstanding such knowledge.

AN action for possession of certain chattels situate on the land of the defendant Brousseau, but claimed by the plaintiff as its property, and for damages for refusal to deliver the chattels. The facts are fully stated in the judgment.

22nd and 23rd April 1942. The action was tried by HOGG J. without a jury at Cochrane.

S. A. Caldbick, for the plaintiff.

H. A. Coon, for the defendants.

2nd June 1942. HOGG J.:—This is an action brought by the plaintiff company for possession of certain goods and chattels, alleged to be owned by it, consisting in large part of electrical machinery, situate upon land now owned by the defendant Brousseau in the township of Tisdale, in the district of Cochrane, and for damages because of the refusal of the defendants to allow the plaintiff to remove this machinery from the land aforesaid.

The said land and machinery were at one time owned by the Davidson Consolidated Gold Mines Ltd. Part of the machinery was seized by the plaintiff company under a writ of execution and sold by the sheriff to La Rose-Rouyn Mines Ltd., as nominee for the plaintiff. On 8th February 1930, by indenture in the form of a bill of sale the La Rose company sold the machinery purchased by it to the plaintiff, and on 2nd April 1930, by a further bill of sale, the rest of the machinery was sold by the Davidson company to the plaintiff. Neither of these bills of sale was registered according to the provisions of The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181.

At the time these bills of sale were executed the Davidson company owned the land, which was afterwards acquired, in November 1941, by the defendant Brousseau. Such part of the

machinery and equipment as has not been sold or removed by the plaintiff still rests upon this land.

The defendant Hynes was employed on 4th July 1930 as a caretaker for the mining lands, and not having been paid wages agreed upon for his services, since 1934, obtained a judgment against the Davidson company for \$3,219.40, and an execution based on this judgment, dated 18th September 1939, was placed in the hands of the sheriff and registered in the Land Titles Office. The land was sold under the execution to the defendant Brousseau for the sum of \$675, which Hynes has received on account of his judgment, leaving a balance still due and owing. After the sale of the machinery in question to the plaintiff, the Davidson company agreed that it might be left upon the Davidson company's property. The plaintiff company removed certain of the articles in 1931 and 1932, but the rest of the equipment still remains on the property. In 1941 the plaintiff attempted on several occasions to take the remaining machinery away from the property, but was prevented from doing so by the defendant Hynes, who refused the plaintiff's employees access to the premises.

The defendant Hynes states that from 1930 to 1939 he, as caretaker of the property, looked after the equipment in question. This defendant was advised by letter of 2nd January 1931 that the Davidson company did not own any of the machinery or plant upon the mining property, these having been disposed of by the company early in 1930, and that no one was to be allowed to remove anything from the property without an order from the Davidson company.

In their statement of defence, the defendants merely deny that the plaintiff company is entitled to possession of the machinery, alleging that the plaintiff never owned it. The defendants also deny that any equipment belonging to the plaintiff company is stored upon the land in question.

At the trial of the action the defence proved to be a claim that the bills of sale above referred to are void, because of the fact that they have not been registered, and that they are also defective in certain other particulars required by The Bills of Sale and Chattel Mortgage Act.

S. 8 of the present Bills of Sale and Chattel Mortgage Act provides that every sale of goods and chattels, not accompanied

by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, accompanied by an affidavit as set out in this section of the Act, and shall be registered, otherwise the sale shall be absolutely null and void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith.

Although the bills of sale under consideration were not registered, it is alleged by counsel on behalf of the plaintiff that there was an actual and continued change of possession of the machinery, that as a result the sale comes within the exception mentioned in s. 8 of the statute, and that the sales are therefore not void. Before 1892, when The Chattel Mortgages Act then in force was amended, the Courts had held that the word "creditors" was to be construed as meaning judgment creditors, and that a mortgagee might at any time validate a mortgage, invalid for want of possession or registration, by taking possession of the mortgaged property. In *Clarkson et al. v. McMaster & Co.* (1895), 25 S.C.R. 96, it was held that after the amendment to the statute in 1892, the avoidance of the mortgage was not to be restricted to persons who were actually creditors at its date, and that the statute clearly indicated that creditors subsequent to the mortgage were included.

In *Barker v. Leeson* (1882), 1 O.R. 114, Boyd C. said (at p. 117):

"The recovery of judgment merely facilitates the proof of the party who is the creditor, but he is as much a 'creditor' before as after judgment. The object of the Act is plainly, by means of registration, to inform everybody that goods apparently in the possession and ownership of A. are not in truth his, but are held by him subject to the claim of B. under a chattel mortgage or a bill of sale. The object of the Act is to enforce a visible and actual transfer of possession upon every change of ownership, or to compel the recording of the instruments which manifest the change of property."

The plaintiff contends that there was actual change of possession with respect to the machinery and equipment in question, known to the defendant Hynes, and that the facts are sufficient to fulfil the provisions of s. 8 of the statute.

In *Kinloch et al. v. Scribner* (1886), 14 S.C.R. 77, Strong J. said that possession is a question of fact and not of law, consist-

ing as it does of the power of physical disposition of the thing which is the subject of it, coupled with the intention to possess as owner. The headnote to the report of this appeal reads:

"The purchaser of the stock of a trader, where the change of ownership is open and notorious, may employ the former owner as a clerk in carrying on the business, and notwithstanding such hiring there may still be 'an actual and continued change of possession' as required by R.S.O., cap. 119, sec. 5."

In *Fitzgerald v. McMorro*, 52 O.L.R. 383, [1923] 4 D.L.R. 619, 3 C.B.R. 29, where a motor car had been sold by a son to his father (the defendant in the action), the son became bankrupt and the plaintiff (the trustee of the insolvent estate) brought action to recover possession of the car, alleging that as against the creditors of the bankrupt the transfer of the car was invalid because of the absence of a bill of sale and of any delivery and any actual and continued change of possession, as required by The Bills of Sale and Chattel Mortgage Act. The son lived with his father, the defendant, and kept the car in a garage owned by the father, who had access to the car, but it was substantially in the son's possession. After the sale there was no change, to all outward appearance, in the control and management of the car, no bill of sale was registered, and the only thing indicating a change of ownership was a transfer to the father of the licence issued under The Motor Vehicles Act. It was held by Orde J. that there was no immediate delivery of the car, nor any actual and continued change of possession, and that the sale and transfer were void as against the plaintiff.

Counsel for the plaintiff contends that as the defendant Hynes was aware of the sale and change of ownership of the machinery, the circumstances are sufficient to satisfy s. 8 of the statute, and reliance is placed upon the judgment of the Court of Appeal of Ontario in *Danford v. Danford* (1883), 8 O.A.R. 518. This was an appeal by the defendant to set aside the verdict of a jury in favour of the plaintiff. The facts, in brief, were that a farmer parted with everything he had necessary to properly conduct his farm, to two of his sons (one of whom was the plaintiff in the action), and the defendant, an execution creditor of the vendor, contended that the sale was void on the ground that there was no immediate delivery and continued change of possession on the sale of a horse in question, as was required by The

Bills of Sale Act. The horse was kept on the farm, as he had always been, the purchaser sometimes using him in work on the farm, and the father (the vendor) sometimes driving him for his own purposes. Patterson J.A., in delivering judgment, said that the facts of the case were sufficient to show the actual relinquishment by the father to the son of the possession of the stable and what it contained, that the father continued residing in the dwelling-house, that he was present about the place, and probably occasionally used the horse. He stated, as his opinion, that the object and purpose of the Act was to strike at secret conveyances, and that it required that the change of possession should be no secret, and further said (at p. 521) :

"Notice or knowledge of a conveyance of chattels may not prevent a creditor or purchaser invoking the aid of the statute in case there has been no registered instrument and no change of possession. But where there has been an actual sale, and between the parties an actual change of possession, knowledge of that change of possession by a particular creditor must be sufficient as to him, whether the rest of the public knew of it or not."

Spragge C.J.O., in his judgment in this appeal, was of the view that the learned trial judge might well have told the jury that not only was there an actual change of possession as well as of ownership, but also that it was reasonable to assume that it was known to the defendant.

Counsel for the plaintiff submits that evidence adduced on behalf of the plaintiff in the present action shows that there was an actual sale, and between the parties an actual change of possession of that part of the equipment and machinery which was the subject of the sale and which now rests on the property, and that the defendant Hynes had knowledge of the change of possession, thus bringing the present case within the judgment in *Danford v. Danford*, *supra*. Some of the machinery which is included in the purported bills of sale was apparently taken possession of by the plaintiff and removed. I am unable to conclude from the evidence that there was an actual change of possession of the machinery and equipment in question in the action. This equipment had apparently remained, and is still situate, upon the mining land owned at the time of the sale by the Davidson company. There is no evidence of any act done by the plaintiff,

or by anyone on its behalf, to segregate the equipment from the other plant on the mining lands, nor is there any evidence that the plaintiff did any outward act at the time of the sale to signify its taking possession. To fulfil even the conditions laid down in the *Danford* case, there must have been an actual change of possession. In that case the horse was actually taken possession of and used at times by the purchaser. As was said by Boyd C. in *Barker v. Leeson, supra*, "The object of the Act is to enforce a visible and actual transfer of possession upon every change of ownership", and the judgment in the *Kinloch* case in the Supreme Court of Canada appears to go even further and to require some publicity and notoriety to be given to the sale to satisfy the statute.

I have no hesitation in finding that the defendant Hynes had knowledge of the change of ownership, but I cannot find that there was an actual change of possession of the machinery and equipment as between the parties to the sale. There is no evidence which would support such a finding.

It appeared at the trial that the defendant Brousseau rested his defence on the fact that he owned the land and contended that he was the owner of the chattels because they were fixtures to the land. The statement of defence must raise all matters which show that the action is not maintainable, or that the transaction is void or voidable in point of law, and all such grounds of defence as are not raised would be likely to take the opposite party by surprise.

The plaintiff was taken wholly by surprise at the trial by the evidence which counsel for the defendants proposed to adduce from the defendant Brousseau that the machinery and equipment were fixtures. This evidence was not admitted, as no such allegation was set up in the statement of defence. In the result it was not necessary.

Action dismissed with costs.

Solicitors for the plaintiff: Caldbick & Yates, Timmins.

Solicitor for the defendants: H. A. Coon, Toronto.

[MACKAY J.]

Darling v. Sun Life Assurance Company of Canada.

Insurance—Life Insurance—Proof of Death of Insured—Presumption from Seven Years' Absence—Effect of Lapse of Policy after Disappearance but before Expiry of Seven-year Period—The Insurance Act, R.S.O. 1937, c. 256, ss. 174, 176.

Evidence—Presumptions—Death—Seven Years' Absence—Claim under Insurance Policy, Lapsed after Disappearance but before Expiry of Seven Years.

An insured, whose policy was then in good standing, disappeared in 1932. His policy was continued in force, under an automatic non-forfeiture clause, until 1934, when it lapsed. In 1940 an order was made, under s. 174 of The Insurance Act, R.S.O. 1937, c. 256, declaring the insured dead. His wife, named as sole beneficiary in the policy, claimed payment of the insurance moneys, but the insurer refused on the ground that it had not been shown that the insured died before the lapse of the policy. *Held*, the plaintiff must succeed. It was well established that although there was a presumption of death after an unexplained absence of seven years, there was no presumption as to the time, within that seven years, at which the death took place. The order, under s. 174(3), constituted incontestable proof of the death of the insured, and the plaintiff had also established that at some time during the seven-year period there had been a valid policy binding the defendant company. The onus then shifted to the defendant, if it wished to avoid liability, to prove that the death took place after the lapse, and it had failed to discharge this onus. Review of authorities.

AN action claiming the proceeds of an insurance policy. The facts are fully stated in the judgment.

24th and 25th February 1941. The action was tried by MACKAY J. without a jury at Kingston.

H. L. Cartwright, for the plaintiff.

H. J. McLaughlin, K.C., and *Dalton Wells*, for the defendant.

6th June 1942. MACKAY J.:—The plaintiff is the widow of Charles Festus Darling and resides at the city of Kingston in the county of Frontenac. The defendant is a body corporate, carrying on the business of life insurance, and having its head office in the city of Montreal, in the Province of Quebec.

On or about 8th April 1926, the defendant issued a policy of insurance, No. 698,837 upon the life of the said Charles Festus Darling. The plaintiff was named in the said policy as beneficiary.

On 5th December 1932, the said Charles Festus Darling left his home in Kingston, where he lived with his wife, the plaintiff, and their four children, and has not been seen or heard of since that time. The plaintiff has caused to be made

extensive and exhaustive inquiries, but has been unable to find any trace of her husband whatsoever.

The financial status of the policy was such that it was kept in force and carried on by the defendant company under the automatic non-forfeiture clause contained in the said policy until 7th August 1934, when reserves credited to the policy were exhausted, and it thereupon lapsed and ceased after that time to have any force or effect.

On or about 12th June 1940, an application under The Insurance Act, R.S.O. 1937, c. 256, was brought before Fisher J., asking that the Court make an order declaring the said Charles Festus Darling dead. Fisher J. was pleased to direct that certain further inquiries should be made.

On 5th September 1940, the material being augmented, Roach J. made an order declaring that sufficient proof had been adduced before him, and that the said Charles Festus Darling was in fact dead. The defendant company was notified of such motion and was represented thereon.

The defendant resists the demand of the plaintiff for the payment of the insurance money, \$1,794.83, on the ground that the death of the insured has not been proved to have taken place before 7th August 1934, when the policy lapsed, and that until such proof is adduced the defendant company is not liable for the insurance money or any part thereof.

The question for determination is not whether or not Charles Festus Darling is dead. The Court has already found so. The question for determination is, has the plaintiff adduced sufficient evidence from which the Court is justified in making an inference that Charles Festus Darling died prior to 7th August 1934, namely, within one year and nine months after his disappearance?

If it is proved that for a period of not less than seven years no information concerning a person has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, there arises a legal presumption that he is dead. There is no legal presumption, however, either that he was alive up to the end of that period or that he died at any particular point of time during such period, the only presumption being that he was dead at the time the proceedings are brought if he has not been heard of during the seven years preceding

such proceedings. If it is necessary to establish that the person died at any particular date within the period, this must be proved as a fact by evidence raising that inference. The *onus probandi* lies on the party who asserts survival, concurrent decease, or predecease.

The known facts are as follows: He, Charles Festus Darling was married in the year 1906. At that time he was a farmer and for five years he and his wife lived on a farm in the county of Frontenac. They then went to western Canada and took up a homestead, on which they remained for one and a half years. Four children were born to Darling and his wife—Irene, born in March 1907, Cyril, born in 1908, Ralph in 1910 and Graydon in 1913.

Darling and his wife, having returned to Frontenac county, remained farming there until about 1915, when Darling was employed by the Rawley Co., with whom he stayed for five years. Then he worked for the Watkins Company for five or six years; then with the Dr. Bell Wonder Medicine Co. for seven years, leaving in December 1931. He, Darling, then worked for the Empire Life Assurance Co. for two months, and finally with the General Insurance Company, with which he was working when he disappeared.

The said Charles Festus Darling was, on the evidence, on most agreeable and happy terms with his wife and family. There is not the shadow of a suggestion that he was interested in any other woman, or that he was other than completely absorbed with and happy in his own family life. It is true that he owed about \$1,000 in all, \$600 of which amount was owed to his mother and had been so owing for over ten years, and the other \$400 was secured by promissory notes given by the said Charles Festus Darling. Indeed, it is not seriously argued that Darling was in any way financially embarrassed. It is true that he had some difficulty in providing for his family, but his wife, from 1925, kept a boarding house in Kingston for students attending Queen's University.

On 5th December 1932, at or near 12 o'clock noon, Charles Festus Darling, taking an over-night grip, left in his car for Westford, and since that time he has been neither seen nor heard of. On the following day Darling's car was sold in Toronto, the price being \$25.00. The cheque was made payable to cash, and according to the record was paid to F. Darling, on

6th December 1932. There is no evidence to identify the person who sold the car, but on the books kept by the used car establishment, the name of F. Darling appears as the seller of the car.

In Halsbury's Laws of England, 2nd ed., vol. 13, p. 632, appears the following short paragraph: "The presumption of death has been thought to be confined to cases where there are in evidence no circumstances which afford ground for a different conclusion; and it has accordingly been held to have no application to the case of a person who would have been unlikely to communicate with his friends. More recent decisions, however, appear to throw doubt on this restriction." *Willyams et al. v. Scottish Widows Fund Life Assurance Society* (1888), 52 J.P. 471, and *Wills v. Palmer* (1904), 53 W.R. 169, are cited. These cases, however, are not helpful, inasmuch as I have been quite unable to find any evidence from which I could conclude that Charles Festus Darling had any cause or reason to keep his identity and whereabouts unrevealed.

In *Hickman v. Upsall* (1875), L.R. 20 Eq. 136, a tenant for life, entitled beneficially under a will, assigned her interest to secure the repayment of certain advances and the premiums on policies on her life. At the end of March 1866, a small amount of money usually paid quarterly was paid to her. Shortly afterwards she went on a pedestrian tour and had never been heard of since. A small sum which became payable at the end of June was never applied for: *held*, that the presumption was that she was dead; that on the evidence she could not have been assumed to have died before June 1866, but that she must be taken to have died soon after June 1866.

In *In re Benjamin; Neville v. Benjamin*, [1902] 1 Ch. 723, one P. in that case, who was then (September 1892) twenty-four years of age, disappeared and he had never since been heard of. Under his father's will, he was entitled to a share of the residuary estate in the event of his surviving the testator. The testator died in June 1893. Upon a summons taken out by the trustees in 1900 to have it determined how P.'s share ought to be dealt with, *held*, that P. must be presumed to be dead, and in the absence of proof that he had survived the testator, the Court, without making any declaration as to the date of P.'s death, gave the trustees liberty to distribute the share on the footing that he predeceased the testator.

In *Danby v. Danby* (1859), 5 Jur. N.S. (Pt. I) 54, one H. quitted England for America in July 1852. He wrote home announcing his safe arrival in New York. There was evidence that he was in declining health when he left England, and that from his character, education and previous life he would, if living, have communicated with his friends in England. Advertisements requesting information concerning him had been inserted in the principal American newspapers, but he was never heard of again. The father of H. died in September 1853, intestate. The plaintiff, who was one of the next-of-kin of the father, supposing the son to have predeceased him, filed his bill for the administration of the father's estate. *Held*, that there was sufficient *prima facie* evidence of the death of H. in his father's lifetime to entitle the plaintiff to have the personal estate secured in Court.

In *In the Goods of Matthews*, [1898] P. 17, Matthews, aged seventy-three, disappeared from his home in Chatham Road, Wandsworth, on 24th November 1894, and was not afterwards heard of. Searches were made by members of the family in the neighbourhood, without result. Advertisements had been published in five newspapers, the Register of Deaths had been searched, and the police had been notified. On 22nd November 1897, Sir F. H. Jeune P. gave judgment as follows: "The time since the disappearance is no doubt, short, but the inquiries made seem to have been ample." *Held*, that the death of Matthews occurred before November 1897.

In *In re Rhodes; Rhodes v. Rhodes* (1887), 36 Ch. D. 586, at the foot of p. 589, North J. quotes Giffard L.J. in *In re Phené's Trusts* (1870), L.R. 5 Ch. 139, who in turn quoted from the judgment of Lord Denman C.J. in *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894, at p. 913, as follows: "Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of, because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed.

If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years."

North J. continues: "That has been constantly acted upon since, and it is utterly at variance with that which is suggested to have been the decision of Vice-Chancellor Malins in *In re Westbrook's Trusts*, [1873] W.N. 167. The other case is *In re Lewes' Trusts* (1871), L.R. 6 Ch. 356."

It would appear that the law is not as strictly construed as is indicated in *In re Lewes' Trusts*, *supra*, and *In re Phené's Trusts*, *supra*, but it is clear that the person upon whom the onus rests must adduce evidence from which it can be inferred that death did take place prior to a particular time in the seven-year period.

In *Buckingham v. Prudential Insurance Company of America et al.* (1933), 1 I.L.R. 124, the Court refused a declaration of presumption of death after seven years' absence, because no useful purpose would be served by granting the declaration. The Court came to this conclusion on the assumption that the burden of proving that the policy did not lapse was on the beneficiary. It would appear that such an assumption is too broad. The declaration of death simply declares that the insured died at some date unknown during the seven-year period. If the beneficiary shows a valid and subsisting contract at any time during that period, then it would seem that under the general rules as to the burden of proof the onus of proving discharge of that contract, whether by non-payment of premiums or otherwise, must rest upon the insurer. *Prima facie* the onus would be upon the defendant to show that the policy had lapsed. "In legal proceedings the general rule is that he who asserts must prove": 13 Halsbury, 2nd ed. p. 542, para. 612, "In considering upon whom this burden falls, a convenient test is to inquire whether the allegation involved, be it affirmative or negative, is or is not essential to the particular party's case, *i.e.*, whether he would fail if it were struck out of the record. If it be essential, and he would so fail, then the burden of proving

it is upon him": *ibid.*, p. 543, para. 613. The defendant here in para. 5 of the statement of defence alleges the lapse of the policy by non-payment of premiums, and the exhaustion of the reserves necessary to keep it alive under the automatic non-forfeiture provisions of the contract. If this plea were struck out of the record, would the plaintiff be entitled to succeed? The Court, by its declaration of presumption of death, has to all intents and purposes said that the insured was dead on 5th September 1940, and that he died at some date unknown between 5th December 1932 and 5th September 1940. The defendant by its pleading admits that the policy was in good standing on 5th December 1932. Unless, therefore, the defendant can show that the death occurred after the policy ceased to be in good standing, the beneficiary is entitled to succeed. In other words, the burden on the beneficiary is to show a policy or contract of insurance and proof of death of the insured. The existence of the contract is admitted and the terms of s. 174(3) of The Insurance Act make the order of Roach J. of 5th September 1940 incontestable proof of death at some time after 5th December 1932. If the insurer wishes to evade liability on the ground of lapse, the onus is on it to show that death took place after the policy had ceased to be a subsisting policy by reason of non-payment of premiums and exhaustion of the reserves applicable under the automatic non-forfeiture clause.

It is submitted by counsel for the defendant that this action is barred by the limitation section of The Insurance Act, s. 176(1). I am of opinion that this contention is completely answered by subss. 2 and 3 of s. 176.

I am of opinion that, having regard to the evidence, embracing all or nearly all of the surrounding circumstances, the Court is justified in drawing an inference that Charles Festus Darling died prior to 7th August 1934, the day on which the automatic non-forfeiture clause ceased to operate.

There will be judgment, therefore, for the plaintiff for \$1,794.83 with interest and costs.

Judgment for the plaintiff.

Solicitors for the plaintiff: Cartwright & Cartwright, Kingston.

Solicitors for the defendant: McLaughlin, Johnston, Moorhead & Macaulay, Toronto.

[COURT OF APPEAL.]

Re Bird.

Wills—Interpretation—Description of Property—Will Speaking from Death—Contrary Intention—The Wills Act, R.S.O. 1937, c. 164, s. 26(1).

A testatrix bought a vacant lot, described as Lot 57, Plan 184, in 1891. She later moved on to the property a small house, which became known as 14 Mitchell Avenue. While the property was in this condition the testatrix made her will, in which she devised "house and premises 14 Mitchell Avenue" to her son W.J.B. The cottage was later condemned by the municipality, and was torn down, and the testatrix built in its place two semi-detached houses, which became known respectively as 14 and 16 Mitchell Avenue. No change was made in the will, but a memorandum signed by the testatrix was produced, showing that she intended W.J.B. to have both houses. *Held*, Riddell J.A. dissenting, the devise was sufficiently broad to cover both of the semi-detached houses, since it was clearly intended to refer to the whole of Lot 57, and thus showed a "contrary intention" within the meaning of s. 26(1) of The Wills Act, R.S.O. 1937, c. 164. *In re Evans; Evans v. Powell*, [1909] 1 Ch. 784, applied.

AN appeal by the residuary beneficiaries from the judgment of Hope J., [1942] O.W.N. 180, [1942] 2 D.L.R. 525. The facts fully appear in the judgments now reported.

5th May 1942. The appeal was heard by RIDDELL, FISHER and HENDERSON JJ.A.

G. A. Binkley, for the residuary beneficiaries, appellants: The clause in the will refers to No. 14. S. 26(1) of The Wills Act, R.S.O. 1937, c. 164, governs, and only the house passes: *Re Hicks*, [1935] O.R. 535 at 536, [1935] 4 D.L.R. 781; *Re Rutherford* (1918), 42 O.L.R. 405 at 406. The exact words of the will are applicable to a thing which was in existence at the date of the testatrix's death.

W. R. Willard, for W. J. Bird, respondent: There was a change in the nature of the property. The testatrix knew the property, comprising both houses, as No. 14. Evidence is admissible to show what property she intended to devise by the clause: Theobald on Wills, 9th ed., p. 107; *Newton v. Lucas* (1833), 6 Sim. 54 at 61, reversed 1 My. & Cr. 391; *Harman v. Gurner* (1866), 35 Beav. 478.

Cur. adv. vult.

11th June 1942. RIDDELL J.A. (dissenting):—In this appeal from the judgment of Mr. Justice Hope, it is fortunate that the facts are plain and not in dispute. In June 1891, the testatrix, Alice Bird, purchased Lot 57 Plan 184, Toronto, being 25 feet on the north side of Mitchell Avenue.

On 30th June 1926, the testatrix made her will, and in Clause 6 she said, "I give to my son, William James Bird, House and premises 14 Mitchell Avenue, Toronto, and 130 Hiawatha Road, Toronto."

The last clause of the will reads: "All the rest and residue of my Estate not hereinbefore disposed of I give, devise and bequeath unto my three children, William James Bird, Albert Percival Bird, and Floina Bird, in equal shares."

In or about 1937, the City of Toronto condemned the cottage; and the testatrix had it demolished and some parts were salvaged and used in the erection of two new semi-detached houses erected on the 25 feet, which two houses became known as 14 and 16 Mitchell Avenue.

The testatrix died on 22nd January 1942.

Mr. Justice Hope declared that both properties passed to William James Bird under the will. An appeal is taken to this Court by the other two beneficiaries mentioned. An objection was taken to our jurisdiction—as I can find no merit or cogency in the objection, I proceed to deal with the question in dispute.

I think it may fairly be inferred that the testatrix intended both parcels to go to William James Bird, and I shall assume that such was the case. The difficulty in the way of the respondent is The Wills Act, R.S.O. 1937, c. 164, s. 26(1), which reads: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

Here, I find no contrary intention expressed in the will, of which we are furnished with a complete copy. Consequently, we must look at the will as though it had been executed at the time immediately before the death of the testatrix.

At that time, it is, I think, plain that the language employed covered only what is now known as No. 14; and it is always to be borne in mind that in interpreting a will, it is the legal meaning of the language employed that should govern.

This view would be strengthened if we were to admit as evidence (as to which I express no opinion) the document in which the testatrix plainly showed that the language of her will did not cover the two parcels—unfortunately, she took no steps to effect her intention to have both parcels go to William James Bird.

I think the appeal should be allowed, costs of all parties to be paid out of the estate, the litigation being caused by the language of the will.

It may not be out of place to add that as we are a Court of law and not a Court of morals, it is not within our jurisdiction to direct the appellants to carry out the express wish of their mother which must now, at least, be well known to them. That is a matter wholly within their own discretion.

FISHER J.A.:—This is an appeal from the judgment of Hope J., on an application interpreting paragraph 6 of the will of the deceased.

The facts and circumstances—and they are not in dispute—are as follows: The testatrix purchased lot 57 on the north side of Mitchell Avenue in Toronto, in or about the year 1891, containing a frontage of 25 feet on Mitchell Avenue. At that time the lot was vacant. Subsequently the testatrix moved a small house on to the property, and it was then known as No. 14 Mitchell Avenue. In June 1926 the testatrix made her will, and paragraph 6 reads:

“I give to my son William James Bird House and premises 14 Mitchell Avenue, Toronto, and 130 Hiawatha Road, Toronto.”

On this appeal we are not concerned with the Hiawatha Road property.

In 1937 the municipality condemned the cottage and it was destroyed and removed. In 1938 a two-family semi-detached house was erected upon this 25-foot lot and thereafter these two houses were designated by the municipality and were afterwards known as numbers 14 and 16 Mitchell Avenue. The testatrix died on 22nd January 1942, and it was admitted by all interested parties that after her death there was found amongst her papers a document which read:

“May 17, 1940. I have got two houses that I had last built on 14 Mitchell Ave. are for my son Will [meaning W. J. Bird] and his wife at my death, [Signed] Mrs. Alice Bird, my last Will.”

It was, of course, admitted that this document, not having been witnessed, was inoperative as a codicil to her will.

The will contains a residuary clause.

The learned trial judge found and declared, “that the will passed to William J. Bird all of the said lot 57 having upon it

the double dwelling house now known as 14 and 16 Mitchell Avenue."

This appeal followed and the appellant's contentions are, that s. 26(1) of The Wills Act, R.S.O. 1937, c. 164, which reads: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will", applies; that there was no contrary intention in the will and that the will, speaking from the date of the death, passed to William James Bird only the one-half of the new double house known as No. 14 Mitchell Avenue, and not 16 Mitchell Avenue.

My brother Riddell, with whom I regret I am unable to agree, is of opinion that notwithstanding it was the intention of the testatrix to give both houses to William J. Bird, and there being no contrary intention expressed in the will, s. 26(1), *supra* applies, and that the house 16 Mitchell Avenue, at the death of the testatrix, fell into the residuary estate.

It is clear to my mind, the testatrix having by her will specifically described and identified the property she devised to her son, that notwithstanding the fact that the description at the date of death applied to part only of the property, the devise covered and included not only the land itself, but all the buildings thereon at the date of death, and further that even if there was a changed condition of the property subsequent to the making of the will, that changed condition satisfied the description of the property devised under the will.

Full support for this conclusion is, I think, to be found in *In re Evans; Evans v. Powell*, [1909] 1 Ch. 784. In that case the testator by his will devised to his wife for life with remainder to his daughter, "house and effects" known as Cross Villa, situate in T. At the date of his will he was possessed of half an acre of ground with a house upon it, the premises being known as Cross Villa. Subsequently, upon a part of the ground separated from the rest by a hedge, he erected two semi-detached dwelling houses which he named "Ashcroft Villas." He died in 1908.

In that case it was held that, the testator having done nothing in reference to this property amounting to a revocation of the devise, and not having parted with any portion of the premises,

the devise passed the whole of the property with all the erected buildings thereon, and that there was no intestacy.

Joyce J., in disposing of the *Evans* case referred to the following words of Lindley L.J. in *In re Portal and Lamb* (1885), 30 Ch. D. 50, at p. 55: "It [meaning section 24 of The English Wills Act] does not say that we are to construe whatever a man says in his will as if it were made on the day of his death." Hawkins on Wills, 3rd ed., at p. 27, on the authority of *In re Evans*, says: "A specific devise is not cut down by an alteration in the property made after the date of the will." Reference may also be had to *In re Davies; Scourfield v. Davies*, [1925] Ch. 642.

The Court, in construing a will such as this, is entitled to take into consideration the condition of things in reference to which it was made, and, where there exists a specific description, to consider all the circumstances relating to the property and material to identify the thing described; see Theobald on Wills, 9th ed., p. 107.

I am of opinion that a contrary intention within the meaning of s. 26(1) of The Wills Act, appears here from the fact that the testatrix has used the description, "14 Mitchell Avenue" to refer to the whole Lot 57. The description "14 Mitchell Avenue" meant the same to her as the description "Lot 57", and therefore the will must be read as if she had said "Lot 57".

If house No. 16 fell into the residuary estate, it would be due to the fact that the municipality had designated one of the semi-detached houses as No. 16, and not to the acts or the intention of the testatrix. Had a duplex house been built upon the property, and had the lower been designated as 14 or 14A and the upper as 16 or 16A, I do not think that fact would alter or interfere with a devise of the whole property to the devisee under the will. If it did, it would lead to the ridiculous result that house No. 14 and the land thereunder would belong to one person and house No. 16, with no land thereunder, would belong to someone else.

I see no reason to interfere with the conclusion of Hope J., and would dismiss the appeal, with costs payable out of the estate.

HENDERSON J.A.:—I have had the privilege of reading the opinions of my brother Riddell, the acting Chief Justice, and of

my brother Fisher in this case, wherein the facts and circumstances are fully stated, and I have been in considerable doubt as to the proper conclusion.

I am clearly of the view that the memorandum of 17th May 1940 is not evidence at all and should not be admitted as evidence. It is agreed that it has no testamentary effect and indeed if I were accepting it as evidence I would consider that it tells against rather than for the contention of the respondent. In my view it has had the effect of confusing the issue.

I have, however, reached the conclusion that the devise in the will to the respondent was intended to be a devise of Lot 57 on the north side of Mitchell Avenue, containing a frontage of 25 feet, described and known at the date of the will as "14 Mitchell Avenue", and upon the authority of *In re Evans; Evans v. Powell*, [1909] 1 Ch. 784, and the cases there cited, I conclude that this should prevail. The numbering of the houses by the municipality should not defeat the intention of the testatrix. I therefore agree that the appeal should be dismissed with costs payable out of the estate.

Appeal dismissed with costs out of estate.

Solicitors for the appellants: Binkley & Harries, Toronto.

Solicitor for the respondent: W. R. Willard, Toronto.

[COURT OF APPEAL.]

City of Toronto v. Lever Brothers Limited.

Taxation—Municipal Business Assessment—Use of Premises—"Free Gift Store" Operated by Manufacturer to Promote Sale of its Product—The Assessment Act, R.S.O. 1937, c. 272, s. 8.

The essential consideration, in determining the rate at which premises shall be assessed for business tax under s. 8 of The Assessment Act, R.S.O. 1937, c. 272, is the nature of the business for the purposes of which the land is occupied or used, rather than the activities actually carried on upon the premises themselves. *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326; *Re City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73, referred to. The premises here in question, in which a manufacturer of soap operated a "Free Gift Store" where premiums were exchanged for coupons, as part of an advertising plan to promote the sale of the company's soap, *held* to be properly assessable under clause (e) of s. 8(1), as part of the occupant's manufacturing business, rather than as a retail store under clause (i).

AN appeal by the City of Toronto from the judgment of Macdonell Co. Ct. J., of the County Court of the County of York, reducing the respondent's business assessment.

A case was stated as follows:

21st May 1942. MACDONELL CO. CT. J.:—The respondent is a company occupying premises on Eastern Avenue in the city of Toronto for the purpose of manufacturing soap and distributing its products. In 1941, it occupied premises at 116 Yonge Street in the said city, which it called a "Free Gift Store", and where it displayed and distributed such articles as tableware, clocks, clothes brushes, and manicure sets. There were some 125 different gifts which could be obtained by persons by presenting coupons from wrappers of soap manufactured by the respondent, or by presenting part coupons and part cash. No article could be obtained for cash only.

The respondent sells its products through wholesale merchants and large retail merchants. It does not sell direct to the public or to the persons who present the coupons. Advertisements are published by the respondent advocating the collection of coupons from soap wrappers, stating the list of articles that can be obtained in exchange for coupons or for coupons and cash, and advising that such articles may be obtained at the "Free Gift Store", 116 Yonge Street, Toronto. The said articles are purchased by the respondent at wholesale rates, and are "marked up" 30 per cent. for the purpose of fixing the number of coupons, or the number of coupons and amount

of cash, at which the article is offered. Each coupon has a value known to the respondent and this value is included in determining the cost of the product. The occupation of the premises is part of an advertising plan to promote the sale of soap.

A catalogue listing the above-mentioned gifts is issued for the benefit of persons outside the city of Toronto. They may send in their coupons, or their coupons and cash, to the manufacturing premises of the respondent, and "gifts" will be forwarded to them in exchange. The store on Yonge Street is situated at a convenient location for persons in Toronto to see and select from the said articles.

The assessed value of the premises occupied by the respondent in 1941 was \$26,800, and the Court of Revision determined that the respondent should be assessed for 60 per cent. of the assessed value, or \$16,080 under clause (e) of s. 8(1) of The Assessment Act, R.S.O. 1937, c. 272. The respondent appealed, and asked to be assessed for 25 per cent. of the assessed value, or for \$6,700, under clause (i) of the said subsection—"the business of a retail merchant"; or under clause (k)—"any business not before in this section or in clause l specially mentioned."

DECISION

The appeal was heard by me on 15th January 1942. I allowed the appeal and reduced the assessment to \$6,700.

REASONS FOR MY DECISION

The City contends that the store is part and parcel of the business of manufacturing and that the premises should be assessed under s. 8 of The Assessment Act as those of a manufacturer, and that 60 per cent. of the assessed value should be charged. It is contended by the company on the other hand that, irrespective of what is the object of opening the store, what is being carried on there is either a retail business, in which case the provisions of subs. (4) of s. 8 govern, or that in any event it is not a manufacturer and that the provisions of clause (k) of subs. 1 govern, and that what is being carried on is a business not otherwise mentioned in the section.

It is argued by counsel for the company that the general scheme of this section of the Act is to divide occupations according to what is actually done on the premises, as is well exemplified in clause (d) of s. 8(1). I do not think there is any

doubt that that is the general scheme of the section. On the other hand, my attention is called by counsel for the City to the decision in *Re City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73, and the *Studebaker* case (1919), 46 O.L.R. 78, 49 D.L.R. 326, which, it is contended, establish the principle that branch stores, operated as branches in which the product of the manufacturer is sold, constitute part of the business of manufacturing.

Reading the section of the Act as a whole, it is clear that what the City should be concerned with is the actual business which is carried on in the premises in question, and not the business of the company as a whole.

Having reached this conclusion as to the meaning of the Act, what I have to decide is a straight question of fact, whether what is being carried on on the premises, so far as the City is concerned, is manufacturing, or whether it is a retail store or something else.

It is always difficult to draw the line in cases of this kind, but I think it should be drawn here. I must find as a fact that what is being carried on is a retail business. In any event, it is far more in the nature of a retail business than of manufacturing. It is quite true that the object of the company in carrying on whatever business it carries on at the store, is advertising, which may be said to be part of selling its product. If the general business of the company as a whole should govern in every case it is clear that quite ridiculous results might follow. For example, I do not think that the City would agree that a factory operated by a department store such as the T. Eaton Co. Limited should be assessed as a retail store.

For these reasons I think the appeal should be allowed and the assessment should be entered at 25 per cent. of the value of the property in place of 60 per cent. as at present.

QUESTION

1. Upon the facts above stated, and upon a true construction of The Assessment Act, particularly s. 8 thereof, as applied to such facts, was I right in deciding that the assessment should be decided by determining the actual business carried on in the premises in question, rather than by determining the business of the company as a whole, and therefore that the respondent should be assessed for business assessment for 25 per cent. of

the assessed value of the premises occupied by it at 116 Yonge Street, in the city of Toronto?

2. If Question 1 is answered in the negative, is the respondent assessable for business assessment in respect of the said premises as a manufacturer for 60 per cent. of the assessed value of the premises occupied by it, pursuant to clause (e) of s. 8(1) of the said Act?

2nd and 3rd June 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and HENDERSON JJ.A.

J. P. Kent, K.C., for the City of Toronto, appellant: The nature of the company's business as a whole should have been considered, rather than the use made of these particular premises: *Re Hydro-Electric Power Commission of Ontario and City of Hamilton* (1920), 47 O.L.R. 155 at 162, 52 D.L.R. 526; *Re City of Chatham and Canadian Leaf Tobacco Co.*, [1938] O.W.N. 265, [1938] 3 D.L.R. 430; *Re City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73; *Loblaw Groceries Co. Limited v. City of Toronto*, [1936] S.C.R. 249 at 253-4, [1936] 3 D.L.R. 346. Where a manufacturer also carries on a retail business, special provision is made by s. 8(4) of The Assessment Act.

There is a right of appeal in this case, because the question is one of law, on the construction of the statute: *Re Loblaw Groceries Co. Limited v. City of Toronto*, *supra*; *Re Western Life Assurance Company and City of Toronto*, [1940] O.W.N. 176, [1940] 3 D.L.R. 121.

H. C. Walker, K.C., for the respondent: The trial judge found as a fact that the business carried on on these premises was that of a retail merchant. The purpose for which the particular premises are occupied must be considered, rather than the company's business as a whole: *Re Western Life Assurance Company and City of Toronto*, [1940] O.W.N. 176 at 179, [1940] 3 D.L.R. 121; *Re International Metal Industries Ltd. and City of Toronto*, [1940] O.R. 271 at 283, [1940] 3 D.L.R. 50; *Re City of Chatham and Canadian Leaf Tobacco Co.*, [1938] O.W.N. 265, [1938] 3 D.L.R. 430.

This taxpayer has more than one business—s. 8(3) recognizes the possibility of this. We must not look at the principal business alone. The plain words of s. 8(4) should be applied.

Cur. adv. vult.

10th June 1942. The judgment of the Court was delivered by

HENDERSON J.A. (after setting out the stated case):—As will be seen, the matter involves the consideration of s. 8 of The Assessment Act, R.S.O. 1937, c. 272. I refer to the foregoing words in the stated case:

“Reading the section of the Act as a whole, it is clear that what the city should be concerned with is the actual business which is carried on in the premises in question, and not the business of the company as a whole.

“Having reached this conclusion as to the meaning of the Act, what I have to decide is a straight question of fact, whether what is being carried on on the premises, so far as the City is concerned, is manufacturing, or whether it is a retail store or something else.”

What is necessary under s. 8 of The Assessment Act is to determine the real character of the business for the purposes of which the land is occupied or used. It may be necessary in some cases to look beyond the activities upon the premises to ascertain the real character of the business. For example in *Re Studebaker Corporation of Canada Limited and City of Windsor* (1919), 46 O.L.R. 78, 49 D.L.R. 326, where the premises were used to display and sell motor cars, the Court, looking beyond that, determined that this was merely one part of the business of a manufacturer, although no manufacturing was done there. In *Re City of Toronto and Belding Corticelli Ltd.*, [1939] O.R. 409, [1939] 3 D.L.R. 73, where the premises were principally used for supplying the wholesale trade with goods of the occupant's manufacture, the Court held that the occupant should be assessed for business assessment as a manufacturer.

In the present case the county judge has found that “the occupation of the premises is part of an advertising plan to promote the sale of soap.” The respondent is a manufacturer of soap. The respondent itself publicly announces these premises as a “Free Gift Store”, and the stated case sets forth the manner in which they are used to promote the sale of soap of respondent's manufacture.

To classify the business for which the premises are occupied as that of a retail merchant is simply to close one's eyes to its real character. The business carried on is part of the respon-

dent's manufacturing business, as the learned county judge himself has said.

I am therefore of opinion that the appeal should be allowed with costs, and that the assessment appealed from should be restored.

Appeal allowed with costs.

Solicitor for the City of Toronto, appellant: C. M. Colquhoun, Toronto.

Solicitors for the respondent: Blake, Lash, Anglin & Cassels, Toronto.

[ROACH J.]

Re Ritchie.

Conflict of Laws—Choice of Law—Intestate Succession—Interest in Partnership Property—Mortgages on Land—Governing Date.

R. died intestate, resident and domiciled in the State of Ohio. His assets included, *inter alia*, an interest in a "syndicate agreement" referring to lands in Ontario, and a number of mortgages on land in that Province. On a motion by the Ontario administrator, *held*, the effect of the syndicate agreement, quoted at length in the judgment, was to create a partnership between R. and the other parties to the agreement. R.'s interest in the assets of the syndicate was therefore, by virtue of s. 23 of The Partnership Act, R.S.O. 1937, c. 187, an interest in a moveable, and it must therefore be distributed according to the law of Ohio.

Held, further, as to the mortgages, there was a vesting of all mortgages owned by R. at the time of his death, and since they were immoveables, the proceeds of any mortgages realized between the death of the testator and the time of distribution must be distributed according to the law of Ontario.

Devolution of Estates—Share of Widow—Effect of Amendment to Statute—The Devolution of Estates Act, R.S.O. 1937, c. 163, ss. 11, 29; 1941 Amendment, c. 19, ss. 1, 2.

The amendment to ss. 11 and 29 of The Devolution of Estates Act, R.S.O. 1937, c. 163, by 1941, c. 19, ss. 1 and 2, was not retroactive, and the distributive share of the widow of an intestate who died before the coming into force of the amendment must be distributed according to the section as it stood before the amendment, even if the latter has come into force before distribution is actually made.

Executors and Administrators—Foreign Estate—Administration of Assets within Ontario—Distribution—One Beneficiary Entitled to Share only in Ontario Assets.

Although as a general rule it is preferable that an ancillary administrator, in Ontario, of local assets of a foreign estate, should pay over the proceeds of the Ontario assets to the foreign (domiciliary) administrator, yet it remains a matter of discretion for the Court of the local administration. Where there is no question of the solvency

of the estate, and one beneficiary is interested only in that part of the Ontario assets which passes according to Ontario Law, those assets may conveniently be distributed direct to the beneficiaries by the Ontario administrator.

A motion for the opinion, advice and direction of the Court on certain questions arising in the administration of the Ontario assets of the estate of Charles E. Ritchie, deceased. The facts, and the questions submitted, are fully stated in the judgment.

26th March 1942. The motion was heard by ROACH J. in Weekly Court at Toronto.

John E. Kerr, for the administrator.

Everett Bristol, K.C., for the widow of the deceased.

John B. Allen, for a sister of the deceased.

11th June 1942. ROACH J.:—The late Charles E. Ritchie died intestate on or about 13th March 1941, at the city of Columbus, in the State of Ohio, U.S.A. At the time of his death he was resident and domiciled in the State of Ohio.

The deceased left him surviving as his only heirs or next-of-kin, his widow Mabel Marsh Ritchie, and his sister Clara Belle Ritchie.

On or about 26th March 1941, letters of administration of the estate of the deceased were granted by the Probate Court of Summit County in the State of Ohio, to his widow and The First-Central Trust Company of Akron, Ohio.

On 7th August 1941, ancillary letters of administration of the estate of the deceased within the Province of Ontario were granted to The Trusts and Guarantee Company Limited as the lawful attorney of the administrators appointed in the State of Ohio.

The assets of the deceased in Ontario at the date of his death, with their approximate value, were as follows:

(1) Real Estate	\$10,336.10
(2) Mortgages	16,061.16
(3) Book Debts	10,853.18
(4) Cash on Deposit	30,552.17
(5) Interest in Briar Hill Park Syndicate	12,771.21
	<hr/>
	\$80,573.82

The assets of the deceased in the State of Ohio approximated \$900,000.00 in value. It would appear that under the laws of

the State of Ohio these assets are distributable entirely to the widow.

The Devolution of Estates Act, R.S.O. 1937, c. 163, ss. 11 and 29, provided, *inter alia*, that the real and personal property of every man dying intestate belonged as follows: the first \$1,000.00 thereof and one-half of the residue to the widow, and the balance to the next-of-kin. The statute was amended in 1941, by 5 Geo. VI, c. 19, ss. 1 and 2, and by the amendment the first \$5,000.00 and two-thirds of the residue of such an estate belongs to the widow and the balance of the residue to the next-of-kin. The amending Act received the royal assent, and the session was prorogued, on 9th April 1941. The amending Act therefore came into force sixty days thereafter.

The opinion, advice and direction of the Court is now sought by the administrator in respect of the following questions:

Question One. Is the distribution of the following properties and assets governed by the laws of Ontario or the laws of Ohio:

(a) the right and interests of the deceased under and by virtue of a certain syndicate agreement dated 21st November 1911 (Briar Hill Park Syndicate) and in and to the moneys and other assets held by the trustee named in the said syndicate agreement;

(b) the mortgages upon lands in Ontario held by the deceased, or the proceeds thereof?

Question Two. If such distribution is governed by the laws of Ontario, then do the provisions of The Devolution of Estates Act before its amendment or as amended apply?

Question Three. Having regard to the fact that the beneficiaries all reside in the State of Ohio, should the administrator in Ontario make distribution direct to the beneficiaries or to the administrator in Ohio:

(a) of the property in Ontario, the distribution of which is governed by the laws of Ontario;

(b) of the property in Ontario, the distribution of which is governed by the laws of Ohio?

Question Four. In the distribution of the assets of the deceased under administration in Ontario, what proportions of the debts of the deceased should be chargeable to the property distributable to his widow and sister respectively?

I now deal with these questions in the order stated:

Question One (a), as to the interest of the deceased under the syndicate agreement:

In order to answer this question it is necessary first to consider the terms and purposes of the agreement. The parties to the agreement are The Trusts and Guarantee Company Limited, therein called "the Trust Company" of the first part, and the various persons or corporations signing the agreement, therein called "the Syndicate" of the second part. By way of recitals the agreement states that acting on behalf of the Syndicate one Stockdale, in trust, made an offer to purchase certain lands and premises known as a portion of Briar Hill Park, from one Waddington; that Stockdale has assigned all his interests under the said agreement to the Trust Company; and that it is desirable that the terms under which the said assignment was taken and "the terms and conditions under which the said property shall be developed and sold" should be formally set out.

The operative part of the said agreement provides, *inter alia*, as follows:

1. The Syndicate and each member thereof shall, on demand by the Trust Company, pay to the Trust Company as agent for the Syndicate "the portion or percentage of the total amount of the purchase price of said property, and of the improvements, developments, . . . and of all expenditures or liabilities contracted or to be contracted by the Trust Company hereunder, set opposite the signature of each member of said Syndicate . . . to be applied . . . towards the payment of the above purchase money and other expenses."

2. That upon default in payment subject to certain conditions, the interest of any member of the syndicate under the agreement shall cease and determine and "In any such event the other members of the Syndicate agree to undertake pro rata according to their subscriptions hereunder the liability of the member or members whose share or shares have been forfeited."

3. "That each member of the Syndicate . . . shall have an undivided interest in the said property, and in the proceeds of the sale thereof, in the proportion aforesaid", subject to the right of the Trust Company to receive ten per cent. of the net profits.

4. The members of the Syndicate shall select a committee of two of their members, which committee shall exercise con-

trol over, and give directions to, the Trust Company, and subject to such control and direction the Trust Company shall have power to sell the whole or any part of the lands, and build on the land and develop and otherwise improve the property.

5. "The undivided interests of the members of the Syndicate shall be non-negotiable and non-assignable, and not subject to charge, mortgage or pledge, except with the consent of the Committee."

6. "After payment of all liabilities and disbursements, and after repayment of the moneys paid in by the members of the Syndicate, the majority (in amount paid in or contributed) of the members may decide to divide among themselves, in specie, the assets then remaining, in proportion to the respective interests of the members of the Syndicate."

7. The proceeds of sales, after first providing for all liabilities and disbursements shall be paid to the members of the Syndicate as the committee may from time to time determine.

There are other provisions of the agreement which are immaterial to this motion.

This agreement was signed by C. E. Ritchie and seventeen other persons. Opposite the signature of Ritchie appear the figures "25%", indicating the extent of his interest.

The syndicate carried on the business originally contemplated by the agreement. The land was developed and a large part of it was sold. Houses were either constructed or purchased by the syndicate and it would appear from a statement of assets and liabilities as of 31st March 1941, that during these operations mortgages were either given by or on behalf of the syndicate, or assumed by it, and the amount unpaid thereon as of the date of that statement was \$38,525.90. The original capital invested was \$120,000.00 and this has all been repaid. The assets of the syndicate are entirely situate in Ontario and consist of real estate, land mortgages, agreements for the sale of land and cash on hand. There is an estimated surplus of assets over liabilities amounting to \$51,084.84.

In my opinion, the legal result of the syndicate agreement was the creation of a partnership.

By virtue of The Partnership Act, R.S.O. 1937, c. 187, s. 23,* the interest of the deceased therein is an interest in a movable. The succession to a movable being governed by the *lex domicilii*, Question One (a) is answered by declaring that the distribution of the interest of the deceased in the assets of the said syndicate is governed by the laws of the State of Ohio.

Question One (b), as to mortgages held by the deceased on Ontario lands, and the proceeds thereof:

It was conceded by Mr. Bristol during argument that these mortgages are immovables and that therefore the law of Ontario governs their distribution, but he argued that this did not apply to the proceeds of mortgages realized by the administrator, and that the governing factor was the nature of the assets as of the date when distribution may be made. I do not agree with that contention. There is a vesting as of the date of the death, and that is the material time.

Question One (b) is therefore answered by declaring that the succession and distribution of the mortgages held by the deceased on lands in Ontario, and the proceeds thereof realized subsequent to the death of the deceased, are governed by the laws of Ontario.

Question Two: I do not think that there is any room for argument as to this question. The amendment to The Devolution of Estates Act passed in 1941, subsequent to the death of the deceased, is not retroactive. This question is therefore answered by declaring that where succession and distribution is governed by the laws of Ontario, The Devolution of Estates Act, R.S.O. 1937, c. 163, that is, the statute as it stood prior to the amendment, applies.

Question Three: As to whether the Ontario administrator should, after payment of creditors' claims and the cost of administration, pay over the surplus to the domiciliary administrator or distribute it directly to the beneficiaries entitled, the reported decisions indicate that as a general rule payment to the domiciliary administrator is to be preferred. It is still a matter of discretion, to be exercised by the Court of the country of

*"23. Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner) and also as between the heirs of a deceased partner and his executors or administrators as personal or movable and not real or heritable estate."

local administration. In the case at bar no question of solvency arises. There are ample assets in either jurisdiction to pay creditors' claims. The sister of the deceased has no interest in the Ohio estate, the whole of which, as previously stated, would, under the laws of Ohio, appear to devolve to the widow. The sister is interested only in that part of the Ontario estate of which the distribution is governed by the laws of Ontario.

In the circumstances of this case, Question Three should be answered by directing that the administrator should make distribution to the administrators in Ohio of the property in Ontario, the distribution of which is governed by the laws of Ohio, and should make distribution direct to the beneficiaries of the property in Ontario of which the distribution is governed by the laws of Ontario.

Question Four: I confess to some difficulty in understanding what the administrator had in mind in submitting this question. The procedure which should be followed by the administrator in the payment of debts seems quite clear to me. The personal estate is primarily liable for the payment of the debts, and thereafter recourse may be had to the realty. Apart from the foregoing observation, Question Four can be answered only by stating that proportioning the debts as between the property distributable to the wife and sister respectively does not arise as a problem in the administration.

The costs of all parties may be paid out of the estate, those of the administrator on a solicitor and client basis.

Order accordingly.

Solicitor for the administrator: John E. Kerr, Toronto.

Solicitors for Mabel M. Ritchie, widow: White, Ruel & Bristol, Toronto.

Solicitors for Clara B. Ritchie, sister: Reid & Allen, Toronto.

[COURT OF APPEAL.]

Kong et al. v. Toronto Transportation Commission.

Pleadings—Amendment—Jury Awarding More than Amount Claimed—Motion, after Trial, to Amend Prayer for Relief—Rules 143, 183.

In an action arising out of a collision, the adult plaintiff claimed, *inter alia*, \$1,500 damages under The Fatal Accidents Act, R.S.O. 1937, c. 210, for the death of his infant son. The jury, on this head, awarded \$3,500, which, applying their apportionment of damages, entitled the plaintiff to \$3,010. The record was endorsed for this amount. Three weeks later, the plaintiff applied to the trial judge for leave to amend the prayer for relief in the statement of claim by claiming \$3,010, and this motion was granted.

Held, the amendment should not have been permitted, and the damages awarded under this head must be reduced to \$1,500. Although it was a matter for the discretion of the trial judge, the discretion was a judicial one, and the general principle was that an amendment should not be permitted except where the other side could be compensated in costs. *Lockhart et al. v. Stinson and Canadian Pacific Railway Co.*, [1940] O.R. 140, 51 C.R.T.C. 73, [1940] 1 D.L.R. 23, referred to. It was obvious that the defendant in this case had met only the claim put forward in the pleadings, and little, if anything, had been said at the trial as to the *quantum* of damages, and it might well be that had the higher amount been claimed there would have been further investigation before the trial, and much more extensive cross-examination on this question.

Per Robertson C.J.O.: Where a plaintiff asks for leave to amend his statement of claim after verdict by increasing his claim for damages, (1) the burden is on him to establish that the amendment can then be made without injustice to the defendant, and (2) there should always be something more to justify the exercise of the judicial discretion in his favour than the finding of the jury.

AN appeal from the judgment of Roach J. in an action for personal injuries, entered on the findings of a jury.

The action arose out of a collision between the adult plaintiff's truck and a street car, as a result of which the adult plaintiff and one son were injured, and another son, nine years of age, died. The adult plaintiff claimed, *inter alia*, \$1,500 damages under The Fatal Accidents Act, R.S.O. 1937, c. 210, for the death of this son. The jury awarded \$3,500 under this head, which, applying the apportionment of damages as found, entitled the adult plaintiff to \$3,010. The record was endorsed accordingly. Some three weeks later, the plaintiffs applied to the trial judge for leave to amend the prayer for relief in the statement of claim by increasing the amount claimed under this head to \$3,010. This motion was granted by Roach J. in a written judgment, [1942] O.W.N. 163.

9th and 10th June 1942. The appeal was heard by ROBERTSON C.J.O. and MASTEN and FISHER JJ.A.

I. S. Fairty, K.C., for the defendant, appellant: The claim made by the plaintiffs themselves was only \$1,500, and the jury

awarded the grossly excessive amount of \$3,500. The amendment to the statement of claim was made long after the trial, and was not justified under Rule 130, since Roach J. was no longer "the judge at the trial", within the meaning of the Rule. The trial was over, and Roach J. no longer had jurisdiction.

As to Rule 183, if the learned judge had jurisdiction under this Rule, he should not, on the authorities, have exercised it as he did: *Lockhart et al. v. Stinson and Canadian Pacific Railway Co.*, [1940] O.R. 140 at 145, 170, 51 C.R.T.C. 73, [1940] 1 D.L.R. 23. An amendment should never be made to the disadvantage of the other party, and it cannot be said that the appellant has not suffered by reason of this amendment. Had the claim originally been for so large an amount, there would certainly have been detailed cross-examination as to the earning power of the deceased.

In the alternative, the increase made in the amount claimed would only justify judgment under this head for \$2,588.60, since, on the findings as to negligence, the plaintiff was entitled only to 86 per cent. of the amount claimed: *Parker v. Hughes*, [1933] O.W.N. 508 at 510.

T. N. Phelan, K.C., for the plaintiffs, respondents: Juries in recent years have allowed large amounts on claims under The Fatal Accidents Act, and the Court of Appeal has frequently said that the assessment of damages is peculiarly within the province of the jury. It is always a difficult task to assess pecuniary damages, and the jury's findings should not be interfered with unless there has been misdirection. [FISHER J.A.: Do you mean that this Court cannot interfere, no matter how large the award?] The Court should not interfere where it lacks jurisdiction, and the question of damages is strictly for the jury. *Bailey v. Howard*, [1939] 1 K.B. 453 establishes very wide limits within which the jury may assess the damages: see per Scott L.J. at p. 458. There is here no question of misdirection. See *Healey v. Beach*, [1942] O.W.N. 288 at 290.

There is no reason why the statement of claim should not have been amended. The right of a litigant should not be curtailed by an arbitrary rule, and the Court of Appeal should be able to amend the statement of claim; I refer to an article in 20 Canadian Bar Review, p. 351. The respondents were justified in asking for this amendment. I submit that the amount awarded was quite correct, and the correctness of this assess-

ment is indicated by the fact that the appellants do not quarrel with any of the other awards of damages: see *Warren v. Gray Goose Stage Limited*, [1938] S.C.R. 52 at 57, [1938] 1 D.L.R. 104, 47 C.R.C. 214.

I. S. Fairty, K.C., in reply: It is conceded that the Court of Appeal is always reluctant to interfere with the findings of a jury, but in this case it is absolutely necessary: see *The Ceramic (Owners) v. The Testbank (Owners)*, [1942] 1 All E.R. 281.

The award here was grossly excessive. The deceased was only nine years of age, and the average boy of this age is financially a burden rather than a help. [MASTEN J.A.: He had to go to school; at the most he might have earned his food, keep and bed]. While in the *Lockhart* case, *supra*, the Supreme Court thought that the amendment was a proper exercise of the trial judge's discretion, it was by no means suggested that the same course should be followed in every case.

Cur. adv. vult.

19th June 1942. ROBERTSON C.J.O.:—I have had the privilege of reading the reasons for judgment prepared by Masten J.A. I agree in the result and in the reasons he has stated. I desire to add some observations with respect to the amendment of the plaintiff's claim after the verdict, and the entry of judgment for a larger sum than the plaintiff had claimed.

No doubt a trial judge has power to permit a plaintiff to amend his statement of claim by increasing the amount of damages claimed. The matter is one for the exercise of his discretion—a judicial discretion. I do not agree that the reasons stated by the learned trial judge in this case justified the exercise of the power to amend. The learned judge said, "The factor that should, in my view, regulate the exercise of my discretion on this motion consists in this, namely, having regard to the evidence and the general course of the trial, is it a reasonable conclusion that anything was left unsaid or undone or not pleaded that would have been said or done or pleaded had the plaintiff in the first instance claimed damages under The Fatal Accidents Act (R.S.O. 1937, c. 210) in the sum of \$3,010 instead of in the sum of \$1,500? In other words, can there be any possible injury done to the defendant?"

The learned trial judge assumes that he is in a position to answer these questions. He does answer in these terms:—

"Searching my recollection as to the course of the trial, and reading my notes as to the evidence, I do not think there was anything unsaid, bearing upon the *quantum* of damages under The Fatal Accidents Act, that would or could have been said had the plaintiff originally claimed under that heading the sum of \$3,010."

This seems to me to be much like deciding a case that has never been tried. Who knows what investigation and enquiry the defendant might have made, both before the trial and by cross-examination at the trial, if the larger claim had been before the Court, and who knows further what investigation and enquiry, if made, would have disclosed? The defendant's counsel in fact had little, if anything, to say during the taking of evidence at the trial in regard to the *quantum* of the damages claimed in respect of the death of the nine-year-old boy. Can it be assumed that if the claim had been for \$3,500, the matter of *quantum* would have been so disregarded? And can it be further assumed that neither investigation nor cross-examination of witnesses could have elicited anything at all against a claim, had it been made, for an amount more than double the plaintiff's own estimate of his damages, as appears by his pleading?

With respect, I think the burden is on the plaintiff seeking an amendment to establish that it can be made without any injustice to the defendant, and that the defendant is not really at any disadvantage by having the amendment made after verdict, increasing the amount of the claim.

It further seems to me that there should always be something more than the finding of the jury to justify an amendment increasing the amount of the damages claimed. Why should the plaintiff be allowed to increase his claim for damages after verdict if, before the case went to the jury, no ground was apparent for making such an amendment? I cannot conceive that if the plaintiff here had applied to the trial judge for the amendment now in question after the jury had been charged, but before it retired, it would have been made. No ground could have been urged in support of it at that stage that was not equally available when the trial began. It would have been considered unfair to make the amendment then. Clearly, it is the jury's verdict that has furnished the ground for the making of the amendment here, for the trial judge has

said that had he been assessing the damages he would have assessed them at a sum much less than the amount at which the jury assessed them.

If a practice such as the learned trial judge adopted in this case is to prevail, the provision of Rule 145 that "When damages are claimed the amount shall be named" ought to be stricken out. When the case is tried by jury, the rule would not only be useless: it would mislead any defendant who might happen to think that the rule had any real meaning.

MASTEN J.A. (after setting out the nature of the action, and quoting from the pleadings and the endorsement of the record):—In the course of his reasons for judgment allowing the amendment as asked, Roach J. says, "Had I been trying this case without a jury and had I found it necessary to assess damages under The Fatal Accidents Act, the amount at which I would have assessed such damages would be a sum much less than the amount at which the jury assessed them. That, however, is not the factor which, in my opinion, determines the disposition of the motion now made," and he refers to the judgment of Henderson J.A. in *White v. Proctor et al.*, [1937] O.R. 647, [1937] 3 D.L.R. 599, in support of the order which he made.

With respect to the question whether the appellant's driver was guilty of negligence in his operation of the car, and also in regard to the apportionment of liability directed by the jury, it is impossible to interfere.

In respect of the question of liability there was distinctly conflicting evidence between the witnesses of the respondents and the witnesses of the appellant. Whatever might have been the view of the trial judge, or of this Court, with respect to the weight of that evidence, such view is immaterial on this appeal. There was distinct evidence on behalf of the respondents which, if accepted by the jury, was sufficient to establish negligence on the part of the appellant's driver, and applying the jurisprudence which has been established, I think it is practically impossible for this Court to interfere, whatever may be the theoretical jurisdiction which it may possess.

Likewise with respect to the apportionment of the degree of liability, that is purely a question of fact for the jury with which this Court cannot interfere.

Turning then to the question of the order made by Roach J. amending the statement of claim, on 28th March 1942, more than three weeks after the indorsement of the record, by increasing the plaintiff's claim under The Fatal Accidents Act to \$3,010, I am of opinion that the application ought to have been refused and the claim left at \$1,500 as it stands on the record.

I find myself in agreement with the views of my brother Middleton and my brother McTague as expressed by them in the case of *Lockhart et al. v. Stinson and Canadian Pacific Railway Co.*, [1940] O.R. 140, 51 C.R.T.C. 73, [1940] 1 D.L.R. 23 [reversed on other grounds, [1941] S.C.R. 278, 52 C.R.T.C. 161, [1941] 2 D.L.R. 609], and I concur in the statement of my brother McTague made in that case where he says ([1940] O.R. at p. 170): "I think it is in each case a matter of discretion for the trial judge. On the general principle that amendments should not be allowed, except where the other side can be compensated in costs, I should think the circumstances must be very unusual before amendments of this kind should be allowed."

It is plain common sense that where the defendant comes to contest the claim made by the plaintiff, that claim, and that claim alone, is the subject matter of the contest and is the only point to which the evidence is directed. It may well be, as was argued by Mr. Fairty in the present case, that where, as here, the claim is only for \$1,500, the question of the *quantum* will not be regarded as meriting a contest, or as warranting further evidence and cross-examination in respect to the *quantum*, whereas if the claim had been for so large a sum as \$3,500, an altogether different course of procedure might well and naturally have been adopted.

Coming then to this particular case, apart from the general considerations we have the statement of Mr. Justice Roach in his reasons that if he had found liability under The Fatal Accidents Act he would have awarded to the adult respondent a much less sum than \$3,500. Under these circumstances, and considering the whole situation, I am firmly of the opinion that the amendment in the present case ought to have been refused.

I would therefore reduce the damages awarded to the adult respondent under The Fatal Accidents Act to \$1,500. The appellant thus achieves a substantial success and I think is entitled

to the costs of this appeal, to be set off against the costs of the action.

FISHER J.A.:—I agree with the reasoning and conclusions of my brother Masten, and the disposition he has made relevant to the costs of this appeal. It is well established that the Courts are reluctant to disturb decisions of judges made in the exercise of discretion, but with great respect to the trial judge I am strongly of the opinion, in all the circumstances of this case, that he should have refused the amendment permitting an increase of the damages from \$1,500 to \$3,010. The respondents put in issue, and proceeded to trial upon, a claim for damages fixed by them at \$1,500, and during the trial, so far as I can discover, they did not intimate to the appellant that they proposed to submit evidence, nor did they offer evidence, to prove and claim damages in excess of \$1,500.

If the appellants had known during the trial that the respondents were claiming damages in excess of \$1,500, they no doubt would have availed themselves of cross-examination and the calling of witness to meet any excess.

The Court, of course, has no information upon what grounds the jury ignored the amount the respondents claimed and it must, I think, be assumed that they thought that the respondents—who, no doubt, were advised by their solicitor to claim \$1,500—had been wrongly advised and were entitled to more.

Appeal allowed with costs and damages reduced.

Solicitors for the plaintiff, respondent: Phelan, Richardson, O'Brien & Phelan, Toronto.

Solicitor for the defendant, appellant: Irving S. Fairty, Toronto.

[COURT OF APPEAL.]

Hodgins v. Hodgins.

Divorce—Bars to Relief—Collusion—Agreement between Parties as to Bringing of Action—Husband's Promise Not to Defend—Sufficiency of Evidence of Adultery.

If the initiation of a divorce suit is procured, and its conduct (especially if abstention from defence is a term) is provided for, by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. *Churchward v. Churchward and Holliday*, [1895] P. 7, is still an authority applicable in Ontario, and *Wilhelm v. Wilhelm et al.*, [1938] O.R. 93, [1938] 2 D.L.R. 222, is not a decision to the contrary. *Scott v. Scott*, [1913] P. 52; *Laidler v. Laidler* (1920), 36 T.L.R. 510, considered.

Where, in an uncontested action for divorce, the evidence of adultery is furnished by the simple admission of the defendant husband, who is shown *aliunde* to be acting in concert with the plaintiff, and the only corroboration consists of hotel registration cards, which in reality prove nothing, the evidence must be regarded with the greatest caution. If the trial judge says that he realizes the unsatisfactory nature of such evidence, and has approached it with caution, but that notwithstanding that caution, he is of opinion that adultery is established, his finding will not be disturbed; but if he merely accepts it as sufficient, without considering its objectionable features, it cannot be regarded as supporting a finding. *Aylward v. Aylward* (1928), 44 T.L.R. 456, applied; *Grainger v. Grainger*; *Ward v. Ward*, [1937] O.W.N. 188, [1937] 2 D.L.R. 425; *Robinson v. Robinson and Lane* (1858), 1 Sw. & Tr. 363, considered.

AN appeal by the plaintiff, in an undefended action for divorce, from the judgment of Hope J., [1942] O.R. 243, [1942] 2 D.L.R. 757, dismissing the action. The facts are fully set out in the judgments.

3rd June 1942. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

Harold L. Daufman, for the plaintiff, appellant: It was established that adultery had been committed, and that there was no collusion in that respect, but the agreement of 20th November 1941 confused the issue. I submit that the learned judge was bound by the Ontario decisions as to collusion, of which *McFarland v. McFarland et al.*, [1934] O.W.N. 422; *Yeates v. Yeates et al.*, [1940] O.W.N. 115, and particularly *Wilhelm v. Wilhelm et al.*, [1938] O.R. 93, [1938] 2 D.L.R. 222, are very much in point. In the *Wilhelm* case, Riddell J.A. clearly defined collusion, and this agreement does not constitute a collusive act within the meaning of that definition.

If the learned judge thought that these decisions were wrong, he should have proceeded under s. 31 of The Judicature Act, R.S.O. 1937, c. 100.

The trial judge relied on *Churchward v. Churchward and Holliday*, [1895] P. 7 at 30, saying that in that case there was no collusion relating to the proof of adultery, and that the case was very similar to the case at bar. If English decisions are to be preferred to Ontario cases, reference should be made to *Scott v. Scott*, [1913] P. 52. McTAGUE J.A.: I find myself in accord with the trial judge's remarks as to the remarkable coincidence between the date of the agreement and the dates of the alleged adultery. There is a covenant by the husband in this agreement to facilitate the divorce proceedings. What is that, if not collusion?] There was no collusion in the actual commission of adultery, and that is the decisive question in Ontario, under the decisions.

No one appeared for the defendant, respondent.

Cur. adv. vult.

18th June 1942. RIDDELL J.A. (dissenting):—This is an appeal from the judgment at the trial by Mr. Justice Hope, by which he refused a divorce to the plaintiff. This the learned judge expressed as done with considerable reluctance, and by reason of decisions which he considered himself obliged to follow. The facts are set out clearly and fully in the reasons for judgment and need not here be repeated.

I am of the opinion that unless we wholly disregard the well established rule of *stare decisis* we must allow the appeal.

The law is laid down in this Court in the unanimous decision in *Wilhelm v. Wilhelm et al.*, [1938] O.R. 93, [1938] 2 D.L.R. 222, and there is nothing in the conduct of either spouse in the present case that is more prohibitive of a decree of divorce.

I would allow the appeal; it is not a case for costs.

McTAGUE J.A.:—This is an appeal from the judgment of Hope J. in an undefended action for divorce. His Lordship's reasons are reported in [1942] O.R. 243, [1942] 2 D.L.R. 757.

While the learned trial judge has given a comprehensive account of the facts, I desire to summarize briefly what seem to me the most important of them in so far as they affect the plaintiff's claim for relief.

The parties separated about the first day of August 1939. The alleged acts of adultery are said to have taken place on the nights of 11th-12th October, 1st-2nd November, 8th-9th Novem-

ber, 9th-10th November, and 22nd-23rd November, all in 1941. On 20th November 1941, a very suspicious date, an agreement was entered into between the parties. This was before the issue of the writ on 6th January 1942. By the agreement the husband agreed to pay the costs and to *facilitate in every way* the granting of the divorce. The wife agreed to release the husband from all claims for future support and maintenance providing she obtained a final divorce decree. Just what were the negotiations behind the agreement do not appear. Both parties simply say they signed the agreement after they had had separate conferences with the plaintiff's solicitor. The learned trial judge did not require the plaintiff's counsel to give evidence, as has been done in England, but I understand from him that he did give an opportunity to produce correspondence with the parties, and that counsel either did not have any or did not wish to add to the learned trial judge's burden by producing it. The evidence as to adultery was furnished entirely by the husband, who was called as a witness. He simply admitted adultery on the dates referred to above at an hotel in Toronto, without any particulars whatever. From motives of chivalry, or otherwise, he refused to give the name of the other party. The evidence offered in corroboration of the husband's admissions consisted of certain hotel registration cards produced by an employee of the hotel, who could not identify the signature or identify the signer, nor give any evidence whatever as to what, if anything, usual or unusual, had taken place in the hotel rooms on the nights in question. He did not even know whether the rooms had been occupied by one or two persons.

The question is whether on the above-stated facts the plaintiff is entitled to a decree.

The learned trial judge has refused the decree, basing his judgment on *Churchward v. Churchward and Holliday*, [1895] P. 7. In this I think he was right, and shall endeavour, later in the reasons, to demonstrate why. But the learned trial judge, while perhaps not expressly making the finding, indicated that he thought the evidence warranted a finding of adultery. I cannot agree. I think this is just the very type of evidence which, far from warranting such a finding, is of a character on which such a finding should be made only with the greatest of caution. In England the Courts for some considerable time

had been granting divorce on this type of "hotel bedroom evidence", as it is called in the texts, more or less perfunctorily, until Lord Merrivale arrested the process in the leading case of *Aylward v. Aylward* (1928), 44 T.L.R. 456. In that judgment, his Lordship clearly demonstrated the unsatisfactory nature of that type of evidence, pointing out that fundamentally it was equally consistent with adultery or no adultery, and was definitely conducive towards an abuse of the Court. After all, a registration card, which shows that a woman is supposed to have occupied a hotel room with a man, does not demonstrate adultery in itself. That brings me to the only other evidence of adultery, namely, the admissions made at the trial by the defendant husband. Manifestly this type of evidence is objectionable, if only because of the fact that the witness has an interest. This is a witness who, by an agreement in writing, prior to the institution of the proceedings, stipulated for a release from his obligation to support the plaintiff and maintain his child if a divorce was finally obtained. This is a witness who agreed in writing to *facilitate* the divorce *in every way*. Altogether apart from the doctrine of collusion, I do not think a Court would be justified in making a reasonably sure finding of adultery on such admissions, supported only by hotel registration cards, which really prove nothing. In this case the parties are acting in complete concert, and the Court is deprived of the security for eliciting the whole truth which is afforded in a contest of opposing interests. In these circumstances it seems to me that the Court is bound to find it extremely difficult to make a finding of adultery with sufficient confidence in its truth. There is no doubt that, subject to Rule 787, a Court can find adultery on admissions, as pointed out in *Robinson v. Robinson and Lane* (1858), 1 Sw. & Tr. 363, referred to in *Grainger v. Grainger*; *Ward v. Ward*, [1937] O.W.N. 188, [1937] 2 D.L.R. 425, but the quotation from Chief Justice Cockburn's judgment in the *Robinson* case by Middleton J.A. in *Ward v. Ward* must always be read with two important qualifications enunciated by Cockburn C.J.: first, that admissions unsupported by corroborative *proof* should be received with the utmost circumspection and caution; and, second, that the Court must first reach the conclusion that the evidence is trustworthy. In the case at bar, if the learned trial judge had made it clear that he had taken these qualifications into consideration, his

finding of adultery, if he made one, could not be disturbed. What I am primarily dealing with is this type of evidence in the absence of a finding by the trial judge that he approached it with suspicion and that in spite of that he deemed it trustworthy. On these grounds alone, I think the appeal should be dismissed.

But, as I have said, Mr. Justice Hope put his judgment really on the ground of collusion, following the *Churchward* case, *supra*. In this I think he was right. The *Churchward* case laid down the principle that if the initiation of a divorce suit be procured and its conduct (especially if abstention from defence be a term) be provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. In a case of *Wilhelm v. Wilhelm et al.*, reported on appeal in [1938] O.R. 93, [1938] 2 D.L.R. 222, I, as trial judge, refused to grant a decree *nisi* because I felt reasonably sure that the suit had been initiated by agreement of the parties. That there was an agreement for this purpose, I inferred from the evidence. This was not an agreement in writing, but I felt that I was justified from the evidence in concluding that there had been an oral understanding, and that *Churchward v. Churchward* applied. Reference is made in the judgment of Henderson J.A. to an agreement in writing, in the *Wilhelm* case, made after the action had been commenced. That particular agreement gave me no concern whatever because it merely provided for settlement of a claim for alimony advanced by the plaintiff. I was quite in accord with the reasoning of my brother Henderson that the agreement in writing to which he referred pointed rather to the absence of collusion. As I construe the judgment in *Wilhelm v. Wilhelm*, all that the Court of Appeal decided was that I had been wrong in concluding that there had been an oral agreement between the parties to initiate the divorce proceedings. Read in that way, *Wilhelm v. Wilhelm* is not an authority for the proposition argued in this case, that in Ontario law the principle laid down in the *Churchward* case no longer applies. None of the judges stated that, although Henderson J.A. did say that he thought the authority of the *Churchward* case had been considerably departed from. Even with that proposition I cannot agree. In Halsbury's Laws of England, in Brown and Watts on Divorce, 10th ed., in Hall's Divorce and Matrimonial Causes, and in Rayden on Divorce,

2nd ed., the *Churchward* case is cited as an authority. In Latey on Divorce, 12th ed., p. 124, it is cited as being still regarded as the leading authority on collusion.

On the facts of the *Wilhelm* case, the Court in effect adopted the definition of collusion laid down by Bucknill J. in *Scott v. Scott*, [1913] P. 52. For the purpose of the facts in both the *Scott* case and the *Wilhelm* case, this definition is no doubt correct, but it cannot be said to be exhaustive. In the report of the *Scott* case Bucknill J. merely said that the *Churchward* case was distinguishable. He neither denied its authority nor suggested that he was departing from its authority. In *Laidler v. Laidler* (1920), 36 T.L.R. 510, McCardie J. not only recognized the *Churchward* case as an authority, but followed it in his reasoning. The headnote expressly says that *Laidler v. Laidler* follows the *Churchward* case. Further, McCardie J., in discussing *Scott v. Scott* said that Bucknill J. did not purport to fully define the doctrine of collusion. He says that in his opinion the definition was given for the purpose only of the facts in the *Scott* case, and should be read in conjunction with such decisions as *Rex v. Porter*, [1910] 1 K.B. 369. In *Rex v. Porter* it was held that an agreement by an accused to indemnify bail may be entirely without wrongful intent but, nevertheless, is illegal in that it tends to produce a public mischief. *Laidler v. Laidler* not only does not follow *Scott v. Scott* but expressly approves and accepts the authority of the *Churchward* case, that there may be collusion of a kind and character which is not of the criminal variety, in deliberately conspiring to deceive the Court.

As Henderson J.A. points out in his reasons in the *Wilhelm* case "A consideration of these cases leads one to the conclusion that each case must depend to a great extent on its own facts." In so far as the *Wilhelm* case is concerned, I am bound to accept it as authoritative within the scope of the facts of that case. But when it is advanced as authority for the proposition that collusion is confined to what is wrongful or tricky only, and that the Court is helpless to scrutinize even innocent acts in the circumstances as being collusive, then I am not bound to accept it, because such a proposition was not necessary to the decision. It must be remembered that the Court has rights and that in every divorce case there is involved a public interest going to the very basis of national life. In the public interest the Court has not only a right but a duty to erect reasonable

safeguards and impose its own discipline. If this were not the case, there would be no necessity for a judicial proceeding. Divorce by consent of the parties has never been recognized as a part of English law. But it may rapidly become so in a practical way through a course of conduct if the action for divorce is not rigorously controlled by the Courts.

I think Mr. Justice Hope was quite right in dismissing this action and must be upheld. The defendant not having appeared on the appeal, there should be no order as to costs.

GILLANDERS J.A. agrees with McTAGUE J.A.

Appeal dismissed, RIDDELL J.A. dissenting; no costs.

Solicitor for the plaintiff, appellant: Harold L. Daufman, Kitchener.

[COURT OF APPEAL.]

Appleton et al. v. Ritchie Taxi et al.

Bailment—Liability of Bailee—Special Limitations on Liability—Whether Brought to Notice of Bailor—Automobile Parking Lot.

The defendants were operators of a parking lot in Toronto. The plaintiff A., desiring to avail himself of this lot, drove to the entrance, where he paid a fee, and, at the request of the attendant, left his car at the entrance with the key in place. The car was later parked by the attendant, and moved by another attendant. When A. returned for the car, it could not be found, having apparently been taken from the lot by some unauthorized person. It was later recovered, but certain articles had been stolen. The plaintiffs sued for damage to the car, and for the value of the articles stolen.

Held, apart from any special contract between the parties, it was clear that the defendants had become bailees of the car, and the onus was therefore on them to show that they had taken reasonable care to prevent loss of the goods: *Holder v. Soulby* (1860), 8 C.B. (N.S.) 254 at 265, applied. This onus they had failed to discharge; it was clear, in fact, that there had been negligence in permitting the removal of the car by an unauthorized person.

Held, further, that the defendants could not escape liability by reliance upon a ticket given to A. when the car was parked, which contained a statement, under the heading "Parking Conditions", that the management would not be responsible for loss or damage. Although this condition was easily legible, thus distinguishing the case from *Spooner v. Starkman*, [1937] O.R. 542, [1937] 2 D.L.R. 582, it did not appear that any effort had been made to draw A.'s attention to this special condition, and it appeared that he had accepted it merely as a voucher, to be produced when he called for the car, or possibly a receipt for the parking fee. There were no signs on the premises, and A.'s attention was not drawn in any way to this attempted limitation. The authorities were reviewed.

AN appeal by the plaintiffs from the judgment of Denton Co. Ct. J., in the First Division Court of the County of York, dismissing the plaintiffs' action. The facts are fully stated in the judgment.

17th June 1942. The appeal was heard by GILLANDERS J.A., under s. 122(1) of The Division Courts Act, R.S.O. 1937, c. 107, as amended by 1941, c. 20, s. 5.

I. Levinter, K.C., for the plaintiffs, appellants.

N. M. Dunn, for the defendants, respondents.

25th June 1942. GILLANDERS J.A.:—An appeal from the judgment of His Honour Judge Denton sitting as Judge of the First Division Court of the County of York, dismissing the plaintiffs' action with costs.

The defendants operate a parking lot on Front Street in Toronto. The lot is approximately 30 feet wide and 150 feet deep with access from Front Street and to a lane at the rear. The plaintiff Appleton, desiring to avail himself of the facilities offered, driving a car belonging to his co-plaintiff, stopped at or just inside the Front Street entrance beside a little cabin provided for the attendant. He was there met by the defendants' attendant in charge, who asked if he had left his keys in the car. He paid the attendant 25 cents and the attendant gave him a ticket on which the attendant had first written the licence number of the car. The plaintiff Appleton did not drive the car from the entrance to be parked in the lot but, with the key in place, left it in charge of the attendant.

On his return some hours later to get the car, it could not be found. It was later discovered abandoned in a vacant lot some distance away. A spare wheel and a radio which had been attached to the car, together with some tools and the plaintiff's personal luggage, golf clubs and tennis racket, which had been in the car, were missing. The car had apparently been taken from the lot by some unauthorized person and these articles removed. The plaintiffs sued for damage to the car and for the loss of the articles mentioned.

The attendant who was present when the car was brought in was not called, but an attendant who took charge later testified that he moved the car on one occasion to another place in the parking lot.

The actual ticket handed to the plaintiff is not produced. It is said to have been lost. The plaintiff acknowledges receiving a ticket, but he says he put it in his pocket without reading it. A ticket is produced by the defendants and is said to be the only form then in use by the defendants for parking purposes, and it is not contended that the ticket handed to the plaintiff was not in similar form. On the lower portion of the front of this ticket is printed the following:

“Parking Conditions

“The management is not responsible for damage or loss by fire, theft, collision or otherwise to the car or its contents.

“No attendant has authority to accept responsibility.”

These words are in black type which, while somewhat smaller than the words at the top “RITCHIE PARKING” and “RITCHIE TAXI”, are clear and legible.

The learned judge dismissed the plaintiffs’ action, but has given no reasons in writing.

The appellants claim:

(1) that the defendants were bailees of the car and have not discharged the onus of showing that the requisite amount of care was exercised;

(2) that the evidence clearly shows that the defendants were negligent;

(3) that the plaintiff Appleton is not bound by the conditions on the ticket in question, since the evidence shows that the plaintiff did not know of them or read them; that they were not brought to his attention and that reasonable steps were not taken to draw them to his notice.

For the respondents it is urged:

(1) that the defendants were not bailees of the car but that the relationship between the parties was that of licensors and licensees;

(2) that even if the relationship between the parties was that of bailors and bailees, the defendants are not responsible because (a) it has been shown that ample care was taken to discharge any duty resting upon the defendants, and (b) in any event the plaintiffs are bound by the conditions printed on the ticket and the defendants are thereby exonerated from any liability in the premises.

I think it is clear that the defendants became bailees of the car. Possession of the car was delivered to and accepted by

the defendants for safe custody. The defendants' agent took charge of the car at the entrance, and apparently parked it where he desired in the lot, and later another attendant, for his own convenience, moved it to another place. The facts are distinguishable from those in the case of *Ashby v. Tolhurst*, [1937] 2 K.B. 242. In that case the owner of a car parked it on the defendant's lot and received a ticket from the attendant in charge, but he parked his own car and locked it. He never turned over possession of the car to the parking lot attendant. In that case it was held that the relationship was one of licensor and licensee, and it was clearly pointed out that this rested on the finding that possession of the car remained in the plaintiff, that there was no physical delivery of the car to the defendant, and that there was no contract between the parties except the mere permission to leave the car on the defendant's property.

The defendants being bailees of the car, apart from any special contract that might be proved between the parties, the onus rests on the defendant bailees to prove that reasonable care was used. While a bailee is not an insurer, it is "his duty to take such due and proper care of them as a prudent owner might reasonably be expected to take of his own goods": per Erle C.J. in *Holder v. Soulby* (1860), 8 C.B. (N.S.) 254, at 265, quoted by Riddell J. in *Macdonell v. Woods* (1914), 32 O.L.R. 283 at 296, 20 D.L.R. 366.

It seems clear from the evidence that the purpose of the plaintiff Appleton in taking the car to the defendants' lot and the object of the defendants in receiving it, was to provide safe custody. The defendants' attendant for his own convenience moved the car to the end of the line near the exit and it is admitted that this was recognized as a special hazard. It is said that the keys were hidden in the car, but apparently they were discovered by whoever took it. It is also said that the car could not be moved without the attendant seeing it, but apparently this was accomplished also.

Under all the circumstances I have no difficulty in concluding that the defendants have not discharged the onus of proving that the requisite amount of care was taken, and that there was negligence in permitting the car to be removed from the lot by some unauthorized person or persons.

The difficulty that I find in the case is what effect, if any, should be given to the ticket delivered to the plaintiff Appleton and the conditions printed thereon.

From numerous cases dealing with the effect of conditions printed on tickets of various kinds and under various circumstances, it is evident that there has been no little diversity of judicial opinion on the question of the effect to be given to such conditions. Many of these cases deal with tickets issued by transportation companies. Two cases in our own Courts dealing with claims against the operators of motor car parking lots were mentioned, *viz.*, (1) *Spooner v. Starkman*, [1937] O.R. 542, [1937] 2 D.L.R. 582, and (2) *Way Sagless Spring Company Limited v. Bevradio Theatres Limited et al.*, [1942] O.W.N. 236. The *Spooner* case arose from a claim against the operator of a parking lot for the loss of a motor car. In that case the ticket issued by the bailee contained on the front in type much smaller than the other printing thereon the words "Not responsible for car or contents." The learned County Court Judge before whom the case was tried reviewed in his judgment a considerable number of authorities relating to railway tickets and tickets issued by common carriers and concluded ([1937] O.R. at 555), in the circumstances of that case, "that it was an ordinary case of bailment and not one relating to a common carrier, actual notice to the plaintiff of the condition was not necessary and that the defendant did all that was reasonably sufficient to give the plaintiff notice of the condition." On appeal the judgment dismissing the action was reversed. Mr. Justice Henderson, writing the judgment of the Court, concludes ([1937] O.R. at 558):

"The case, in my opinion, is not to be determined upon the same principle as the many cases governing the responsibility of railway companies issuing tickets, which to the common knowledge of everybody, contain conditions, and, I think, if the defendant desired to limit his responsibility as a bailee for hire, he must show that the attention of the plaintiff was called to such limitation, and, as I have said, it seems to me that the ticket in question is designed more to conceal than to display the limitation."

In a recent case in the Court of Appeal in England, *Chapelton v. Barry Urban District Council*, [1940] 1 All E.R. 356, arising from the hire of deck chairs, several of the ticket cases in Eng-

land were referred to and considered. The case is not exactly in point here because it was held that the ticket or receipt given to the plaintiff in that case was subsequent to the actual contract and that the terms on the ticket were ineffectual to modify the contract. The judgment does, however, indicate the caution with which decisions in many of the railway ticket cases should be applied. The trial judge had been influenced by the decision in *Thompson v. London, Midland and Scottish Railway Company*, [1930] 1 K.B. 41.

In the latter case the plaintiff, who could not read, was held bound by conditions referred to but not printed on the back of an excursion ticket which had been purchased for her by her niece. Lord Hanworth M.R. was careful to point out in his judgment (at p. 49):

“That consideration, that it was an excursion train and a special contract, must be borne in mind; for there are a number of cases which, if you do not bear that in mind, might be taken as applying and applying in a contrary sense to the present case. For instance, I think that in dealing with *Parker v. South Eastern Railway Company* (1876), 1 C.P.D. 618 and 2 C.P.D. 416, it must be remembered as regards the condition which was there relied upon as to limitation of liability in respect of goods deposited in a cloak room, that the limit there arose upon a ticket which had been handed to the depositor; but it was unnecessary for the purpose of the deposit and the safe custody that there should be any terms or conditions at all, or indeed, that there should be a written contract at all. Therefore, the contract was one which could be made, and might very ordinarily be made, without any written conditions of any sort or kind; and that feature is dealt upon as significant in the judgment of Lord Coleridge C.J. in the Court below (1 C.P.D. at 626), where he says: ‘Regard being had to the common and ordinary course of business, it seems to me to be reasonable that a man receiving such a ticket as this should look upon it as a mere voucher for the receipt of the package deposited, and a means of identifying him as the owner when he sought to reclaim it’, and in that sense not containing any special condition to which his attention was to be drawn.”

Lamont v. Canadian Transfer Co. Limited (1909), 19 O.L.R. 291, was a claim against a common carrier for the loss of a trunk turned over to the defendant company for delivery to the

plaintiff. The case is not exactly in point, because the delivery of the receipt in that case was somewhat subsequent to, and not contemporaneous with, delivery of possession of the trunk, and the trunk was placed in the hands of the carrier for transportation and delivery, but the case is indicative of the diversity of opinion as to the result in law.

Keeping in mind what has been said by the Court in the *Spooner* case respecting the applicability of cases governing the responsibility of railway companies issuing tickets, it remains, I think, to decide here whether or not, in the circumstances of this particular case, the defendants have shown that the conditions relied upon to limit liability were called to the attention of the plaintiff, or that reasonable steps were taken to do so.

There is no evidence that any signs were maintained on the premises, and the plaintiff, accepting the invitation of the open entrance and the presence of the attendant, drove in, turned over his car to the attendant and paid his 25 cents, after which he was given a ticket, with his licence number thereon. He swears he put it in his pocket without reading it and though he had used various parking lots for years, "I have been taking those tickets and shoving them in my pocket." The attendant who issued the ticket to the plaintiff was not called.

The effect of the plaintiff's evidence is, I think, that he took whatever ticket was issued to him as a mere voucher or receipt to be produced when going for his car. In this respect the circumstances are, I think, different from cases dealing with the issue of railway tickets. Anyone knows that transportation tickets are more than a voucher or receipt for the passage money; that they contain a statement of the places between which transportation will be provided, the time or times when it will be furnished, the type of transportation to be furnished, and the conditions of passage. It is true that while the conditions on the front of the ticket are not printed in type as large as other words on the ticket, the ticket is not open to the same degree of criticism as made of that in the *Spooner* case, "that it is designed more to conceal than to display the limitation." A look at the face of the ticket would have brought to the plaintiff's attention the existence of conditions.

In the circumstances here, although the ticket was delivered contemporaneously with the defendants' taking possession of the car, I think that the plaintiff was not bound to expect that

a ticket of this sort contained conditions limiting the bailees' obligations, or that it was more than a voucher to identify his car upon his return and possibly a receipt for the payment of the fee paid, and that the defendants failed to do what was reasonably necessary to draw to his attention the fact that they purported, in and by the ticket in question, to limit their liability as bailees of the car.

The appeal must, in my view, be allowed, and the plaintiffs should succeed. The trial judge made no assessment of the damages and nothing was said on the argument before me on the question of damages. The plaintiffs' loss in the claim filed was placed at \$268.00, and the excess over \$120.00 was abandoned to bring it within the jurisdiction of the Division Court. A perusal of the evidence would seem fully to justify a judgment for \$120.00 damages. The plaintiffs should have judgment for \$120.00, together with costs and a counsel fee of \$10.00, together with costs of this appeal.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Luxenberg & Levinter, Toronto.

Solicitors for the defendants, respondents: Tooze, Muir & Dunn, Toronto.

[COURT OF APPEAL.]

Malone v. Trans-Canada Airlines; Moss v. Trans-Canada Airlines.

Negligence—Evidence—Res ipsa loquitur—Burden of Proof—Proper Direction to Jury—Effect of Answers to Questions—Aeroplane Crash.

The effect of the rule *res ipsa loquitur*, where it applies, is that, the plaintiff being unable to prove directly the cause of an accident, a reasonable inference arises, from the accident itself, in the circumstances, that it was caused by the defendant's negligence. To meet this inference it is sufficient if, in the opinion of the jury, the defendant gives a reasonable explanation of a way in which the accident might have happened without negligence on his part; he need not prove that the accident did in fact happen in that way. It is therefore incorrect for the judge to instruct the jury that where the rule applies, the burden is cast upon the defendant to satisfy them that the injury complained of was not caused by his negligence; the burden cast upon the defendant by the rule is not the same as that in motor accident cases. under the statutory onus. *Winnipeg Electric Company v. Geel*, [1932] A.C. 690. [1932] 3 W.W.R. 49, 40 C.R.C. 1, [1932] 4 D.L.R. 51, considered; *United Motors Service, Incorporated v. Hutson et al.*, [1937] S.C.R. 294 at 296, 298, 4 I.L.R. 91. [1937] 1 D.L.R. 737; *Ballard v. North British Railway Company*, [1923] S.C. (H.L.) 43, quoted and applied.

On the trial together of two actions for damages arising out of the crash of an aeroplane in which the plaintiffs' husbands had been riding as passengers, the trial judge first asked the jury whether the defendant had satisfied them that the accident did not result from its negligence or that of its servants, and then whether there was negligence on the part of the defendant which caused or contributed to the accident. The jury answered the first question in the negative and the second in the affirmative, and in their answer to the third question, as to particulars, they made a specific finding of negligence.

Held, although the first question should not have been submitted in that form, and the trial judge's direction as to the burden of proof was wrong, yet the direction as to the second question, which he had carefully separated from the first, while not entirely satisfactory, was not unfair to the defendant, and there had been evidence (including inferences based upon the application of the rule *res ipsa loquitur*) on which the second answer might be given. As to the third question, while it would seem improper to ask such a question in a case where *res ipsa loquitur* was applicable, yet, giving to that answer a properly fair and liberal interpretation, in the light of the evidence and of the circumstances, there was a sufficient finding of negligence, supported by evidence.

APPEALS by the defendant in two actions for damages under The Fatal Accidents Act, R.S.O. 1937, c. 210, from the judgment entered by Mackay J. upon the findings of a jury after a trial of the two actions together. The facts are fully stated in the judgment now reported.

4th and 5th June 1942. The appeals were heard by ROBERTSON C.J.O. and MIDDLETON and HENDERSON JJ.A.

F. J. Hughes, K.C., for the defendant, appellant: As to the burden of proof where a plaintiff relies on *res ipsa loquitur* and the defendant puts forward a possible explanation of the accident, I refer to *Andreas v. Canadian Pacific Railway Company* (1905), 37 S.C.R. 1, 5 C.R.C. 450; *Balne v. Sunnyside Amusement Co. Ltd.*, [1931] O.R. 549 at 571, [1931] 4 D.L.R. 487; *United Motors Service, Incorporated v. Hutson et al.*, [1937] S.C.R. 294 at 296, 297, 298, 4 I.L.R. 91, [1937] 1 D.L.R. 737.

We have suggested an explanation. According to the barograph, the trouble with the plane must have originated at least 800 feet above the ground. The plane was in good mechanical condition, having been tested a few days before the accident. The evidence as to the plane's course at the time of the accident shows that the pilot was already in difficulty, and was not intending to land. This is further shown by the speed, and by the fact that the pilot had not put down his landing flaps. The plane was out of control when it hit the trees. Something may have occurred which made a speed, normally safe, a stalling speed.

There is nothing to justify basing the plaintiffs' case on *res ipsa loquitur*. The onus is on the plaintiffs because of the excep-

tion from liability printed on the ticket. This exception in the contract destroys any presumption of negligence. The defendant has given a reasonable explanation for the accident.

C. A. Thompson (K. C. Stanbury with him), for the plaintiffs, respondents: The doctrine of *res ipsa loquitur* applies in this case as it has done for many years in railway cases. The defendant is a common carrier: *Fosbroke-Hobbes v. Airwork, Ltd. et al.*, [1937] 1 All E.R. 108. [HENDERSON J.A.: Must not some evidence of negligence be offered by the plaintiffs?] There is a presumption of negligence from the mere fact of the accident. *Mulvenna v. Canadian Pacific R.W. Co.* (1914), 5 O.W.N. 779, 25 O.W.R. 675, 15 D.L.R. 616. The weather conditions were good. There is abundant evidence that the accident might have been caused by the pilot's negligence.

The principle of law stated in Charlesworth, Law of Negligence, 1st ed., p. 33, is based on cases where contributory negligence is being considered. A passenger in a plane is in a position analogous to that of a stationary ship in cases of collision at sea.

The evidence establishes that accidents do not usually occur unless there has been an error in judgment, and the explanation put forward by the appellant is not a reasonable one. The first question to the jury is proper, in view of *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, [1932] 3 W.W.R. 49, 40 C.R.C. 1, [1932] 4 D.L.R. 51. If there is an onus on the defendant in some state of affairs, it is reasonable to ask the jury whether he has satisfied them that that onus is discharged. [ROBERTSON C.J.O.: But the defendant is not required to discharge this onus to meet the rule of *res ipsa loquitur*; he is only required to show some other possible explanation for the accident]. The defendant must explain how the accident happened, not how it might have happened. [ROBERTSON C.J.O.: The defendant says the accident might have happened in a number of ways, none of them showing negligence; can you show that it could not have happened in any of those ways?] It is submitted that the evidence, taken as a whole, negatives the idea that this accident was caused by anything for which the defendant is not responsible. The jury were satisfied that none of the suggested theories explained it.

The jury were justified in making a positive finding of negligence. All the surrounding circumstances indicate that the pilot brought the plane too low through his own negligence. [ROBERTSON C.J.O.: The appellant suggests that things went wrong before

that.] The evidence was not so compelling that the jury must have found that. The facts are not inconsistent with the pilot having been negligent in bringing his plane too low. As to the necessity for the defendant showing that the accident happened without negligence, see *Ballard v. North British Railway Company*, [1923] S.C. (H.L.) 43; *The Kite*, [1933] P. 154 at 170; *McArthur v. Dominion Cartridge Company*, [1905] A.C. 72; *The King v. Canadian Tug Boat Co. Ltd.*, [1933] Ex. C.R. 104.

As to the form of the questions to the jury, the whole argument at the trial in connection with the first question, was whether or not *res ipsa loquitur* applied. There was no argument as to the form of the question. Even if the first question is wrongly phrased, there can be no objection to the second question, and on the answer to this question alone the plaintiffs are entitled to judgment. The jury's verdict should be given the widest possible interpretation.

As to the conditions endorsed on the tickets, these cannot alter the common law liability of the defendant, and in any event they are binding only on the purchasers, and not on the present plaintiffs. Further, the application of the rule *res ipsa loquitur* would exclude the operation of these conditions. The jury have found negligence on the defendant's part. There is a limit to the right of any such company to restrict its liability without a licence from the Minister of Transport: see *The Railway Act*, R.S.C. 1927, c. 170, s. 348; *The Transport Act*, 1938 (Dom.), c. 53, ss. 2(1), 3(2), 32.

F. J. Hughes, K.C., in reply: As to the limitation of liability on the tickets, I refer to *Thompson v. London, Midland and Scottish Railway Company*, [1930] 1 K.B. 41; *Grand Trunk Railway Company of Canada v. Robinson*, [1915] A.C. 740; *Cohn v. United Air Lines Transport Corporation* (1937), 17 Fed. Supp. 865; *Wilson v. Colonial Air Transport, Inc.* (1932), 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329.

The point based upon the statutes was not argued in the Court below.

Cur. adv. vult.

29th June 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—These are appeals by the defendant in both actions from the judgment of Mackay J., dated 7th March,

1942, after the trial of the two actions together before him, with a jury, at Toronto.

The actions arose from the death of the husband of each plaintiff, resulting from an accident to an aeroplane of the appellant in which they were passengers.

The appellant operates an aeroplane service across Canada for the carriage of passengers, and has established airports at convenient places, where aeroplanes may land *en route*. On 5th February, 1941, Edward John Malone, the husband of the respondent Agnes Malone, and Harold Moss, the husband of the respondent Florence Moss, became passengers in the appellant's aeroplane at the airport at Malton, near Toronto, for the purpose of travelling to Winnipeg. In the early morning of 6th February, while making a routine landing at the appellant's airport at Armstrong, some distance east of Winnipeg, the aeroplane crashed to the ground and all its occupants were killed.

The respondents allege negligence on the part of the appellant, its workmen, servants or agents. To establish negligence they relied upon the maxim *res ipsa loquitur*, and there are questions as to its application on the facts established in evidence, and with regard to the burden of proof placed upon the appellant, and also as to whether the case was properly presented to the jury, as to the findings of the jury, and whether the findings of the jury are supported by evidence and are sufficient to support the judgment.

The questions put to the jury, and their answers are as follows:

"1. Has the defendant satisfied you that the accident was not caused by negligence on its part? No.

"2. Was there negligence on the part of the defendant which caused or contributed to the cause of the accident? Yes.

"3. If so, in what did such negligence consist? Answer fully. The pilot made an error in judgment and brought the plane too low in his approach toward the runway, causing the plane to hit the tree tops and consequently crash.

"4. What damages do you award?

Agnes Malone	\$ 10,000
Aileen Malone	2,100
Ernest Malone	3,300

"5. What damages do you award Florence Moss? \$4,000."

As much depends upon the application of the maxim *res ipsa loquitur* to the circumstances disclosed in evidence, it is necessary briefly to review the matter.

The appellant's transcontinental business is extensive and highly organized and well-equipped. It has regular schedules upon which its aeroplanes travel, and daily they carry many passengers for long distances, and, almost invariably, in safety. Landing at airports to discharge and to take on passengers, for refueling and other purposes, is a mere incident of this extensive business. Travel by aeroplane must now be regarded as a common means of transport, extensively used, not only throughout North America, but in many other parts of the world. With experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination.

The aeroplane used on the occasion in question was of high-class workmanship; it was regularly inspected, and the evidence is that it was in good condition on the flight from Malton to Armstrong. The aeroplane, after leaving Malton, had landed at North Bay, and again at Kapuskasing. The intended landing at Armstrong was a routine landing, which is defined by one of the witnesses as a landing that would be planned on the trip before leaving the last point of departure. It was not a landing attempted because of some emergency arising between airports. Weather conditions, while wintry, were not abnormal, and were similar to the conditions prevailing on the night before, when a landing had been made at Armstrong without difficulty. There were gusts of wind, but they were neither dangerous nor unusual. From Kapuskasing westerly the aeroplane had been flying at an altitude of 8,000 feet. Approaching Armstrong this had been somewhat reduced in anticipation of landing. As the aeroplane, still high in the air, flew over the airport and over the radio station, which is some distance to the west of it, there was no indication to the observers on the ground of anything wrong or unusual. The aeroplane proceeded, as was customary, for some distance west of the radio station before turning to make its landing. The radio operator at Armstrong had been in telephone communication with the pilot of the aeroplane, and had given him the usual information as to visibility and the direction and velocity of the wind. There was nothing said by the pilot suggesting any trouble, either with himself or with the aeroplane, or any anticipated difficulty in

making a safe landing. The radio operator, and another witness, say that they heard the motor of the aeroplane, both as it passed over the airport going westerly and later after it had turned and was headed back towards the east, and that it sounded normal. At intervals they also saw the red and green lights of the aeroplane, but falling snow prevented a constant view of the lights. One of these witnesses (Kading) says that after he had observed for a time the course of the aeroplane as it circled around to get into position for landing, its lights being sometimes visible and sometimes not, he suddenly saw a white light which seemed to be falling rapidly. This he took to be the tail-light of the aeroplane. He noted the compass bearing of the falling light from the place where he stood, and he says that the bearing he then took was not far off the course in which the wrecked plane was later found.

All the occupants of the aeroplane were dead when the wreck was found. The evidence of those who saw and examined the wreck is that the aeroplane engine had been running and the propellers had been revolving up to the time of the crash. Nothing was found, after close investigation, to indicate that the crash was due to any defect or failure in the aeroplane itself or any of its parts. There was no ice on the wings. The barograph with which the aeroplane was equipped, and which records altitude, is said by the appellant's witnesses to indicate that at a distance of from 800 to 1,000 feet above the ground there had been a precipitous descent of the plane as if it had dived or fallen. Evidently this precipitous descent did not continue to the ground. The aeroplane, before it reached the ground, travelled some short distance in a north-easterly direction over and through the tree-tops before it crashed. The trailing antenna of the aeroplane was found hanging in the top of a tree. A little farther on twigs or branches in the tops of trees were found broken. Still farther on the trunks of two trees had been broken off some distance from the top. Still farther on was found one of the wings of the aeroplane, which had been torn off by a tree, and all of this before the final crash. It is said in evidence by the appellant's witnesses that the aeroplane was, at this time, travelling in a horizontal position, although steadily and rapidly coming to earth, and that at most it could have been a matter of seconds only from the time Kading saw the falling light of the aeroplane until the actual crash occurred. It may be a reasonable inference that for that brief time there had been some degree of recovery of control. The course on which

the aeroplane travelled among the tops of the trees would not have taken it to the runway where landing was to be made.

The facts that I have stated do not, of course, all appear in the respondents' case at the trial. Mainly they are from the evidence of the appellant's witnesses. There is no question, however, of non-suit involved. While the appellant's counsel did not concede that the respondents had made out a case, he expressed his desire to call evidence. In any event, in my opinion, there could have been no non-suit, for the principle *res ipsa loquitur* applied, and there was a case for the appellant to explain. The question whether it did so successfully was for the jury.

The principle to be applied is thus stated in an often-quoted extract from the judgment of Erle C.J. in *Scott v. London and St. Katherine Docks Company* (1865), 3 H. & C. 596 at p. 601:

"There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The learned trial judge, in charging the jury, dealt with the case as if, where *res ipsa loquitur* applies, the same burden of proof is placed upon a defendant as in an action for damages caused by a motor vehicle on a highway, where, by statute, a defendant has the burden of proving that the loss or damage did not arise through his negligence. He accordingly put the first question to the jury in the terms already set forth. The learned trial judge seems to have thought that this was the result of certain *dicta* in the judgment of the Privy Council in *Winnipeg Electric Company v. Geel*, [1932] A.C. 690, [1932] 3 W.W.R. 49, 40 C.R.C. 1, [1932] 4 D.L.R. 51. That was a case of a claim for damages for personal injuries caused by a motor-omnibus. In the course of the judgment (p. 699) Lord Wright said:

"The position of the defendants under the statute is thus analogous to the position of the defendant in a case to which the principle often called *res ipsa loquitur* applies." Later he said:

"It is not necessary in the present case to decide whether or not the matter is one to which the principle *res ipsa loquitur* applies, but the rule as to burden of proof is the same under the statute."

The matter for decision in that case was not, however, what is the result when the maxim *res ipsa loquitur* is applied; it was the effect of the statutory provision as to onus in motor vehicle cases. There is a long course of decisions—many of high authority—with which the *dictum* of Lord Wright would be in conflict, if it were intended that it should apply in all the varied classes of cases where *res ipsa loquitur* applies. Duff C.J. had something to say with respect to the *dictum* of Lord Wright in his judgment in *United Motors Service, Incorporated v. Hutson et al.*, [1937] S.C.R. 294, 4 I.L.R. 91, [1937] 1 D.L.R. 737. Speaking of *res ipsa loquitur*, he said, at p. 296 (S.C.R.) :

“ . . . that phrase is comprehensively applied to cases widely differing in their essential characteristics,” and at p. 298 he said:

“There appears to be no satisfactory ground for thinking that their Lordships in that passage [referring to *Winnipeg Electric Company v. Geel*] intended to say that where the circumstances, in the absence of explanation, afford reasonable ground for negligence, the onus is in the strict sense always shifted and that, in point of law, the burden always rests upon the defendant to establish affirmatively that he is not guilty of negligence. The fair construction of that passage seems to be that their Lordships there are dealing with cases in which there is a presumption of law established by the law itself that, certain facts being established, the defendant is liable.”

The operation of the maxim *res ipsa loquitur*, where it applies, is this, that, the plaintiff not being able to prove directly the cause of the accident, a reasonable inference arises from the accident itself in the circumstances that negligence of the defendant was the cause. To meet this it is sufficient if, in the opinion of the jury, the defendant gives a reasonable explanation of a way in which the accident may have happened without negligence on his part. It is not essential that the defendant should prove that the accident did in fact happen in the way suggested. As was said by Lord Dunedin in *Ballard v. North British Railway Company*, [1923] S.C. (H.L.) 43, “I think that, if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show ‘negligence’.”

In the same judgment, referring to the passage I have already quoted from *Scott v. London and St. Katherine Docks Company*,

Lord Dunedin said, "I take notice of the word 'explanation;' it is not in absence of 'proof'."

Also referring to the same passage from *Scott v. London and St. Katherine Docks Company*, Duff C.J. says in the *United Motors Service* case:

"Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff."

I refer also to *Halliwell v. Venables* (1930), 99 L.J.K.B. 353; 143 L.T. 215, and to the judgment in *McGowan v. Stott*, appended to the report of that case; and to *Langham v. Governors of Wellingborough School et al.* (1932), 101 L.J.K.B. 513. See also an interesting and instructive judgment of Evatt J. in *Davis v. Bunn* (1936), 56 Com. L.R. 246 at p. 263.

The learned trial judge told the jury that, apart from the rule *res ipsa loquitur*, "The plaintiffs would have to prove three things: first, the deaths of their husbands; secondly, that the death of their husbands was due to the defendant's fault, and thirdly, that the plaintiffs, as a result, sustained damage," but that because of the rule it became necessary for them in this case to establish only the first and third, and this because it was for the defendant "to establish to the reasonable satisfaction of the jury that the deaths of the plaintiffs' husbands were not caused through the negligence or improper conduct of Trans-Canada Airlines or their servants." Then, dealing further with the burden of proof upon the defendant, he said, "This burden, under the rule, remains on the defendant until the very end of the case, when the jury must determine whether or not the defendant has shown sufficiently that it did not in fact cause the accident by its negligence. . . . If, however, on the whole evidence, the scales are in balance, or the jury are left in a state of real doubt as to negligence or no negligence, the defendant will be held liable, because the onus under the rule is not satisfied. . . . If, at the conclusion of the evidence, it is too meagre or too evenly balanced to enable the jury to determine the issue as a question of fact, then, by force of the rule, the plaintiffs are entitled to succeed." With respect, this is not a correct statement of the law with respect to the application of *res ipsa loquitur*. The burden of proof was not as stated, and the answer of the jury to the first question will not support a judgment for the plaintiffs.

If this were all, a new trial would undoubtedly be necessary. There was evidence that entitled the respondents to have their cases submitted to the jury, and upon which a jury might have found that the accident was caused by the defendant's negligence. That is not what the jury were asked in the first question, but there is the answer to the second question in which the jury found that there was "negligence on the part of the defendant which caused, or contributed to the cause of, the accident." The trial judge discussed the questions in his charge. He said:

"In question 2 the onus is on the plaintiff, and you will remember what I told you about onus, that if the scales are perfectly in balance the onus has not been met, but if the onus is on the plaintiff and the scale representing the evidence of the plaintiff goes down, then there is what we call a preponderance, and the evidence [onus?] has been met."

I cannot see anything unfair to the defendant in the charge to the jury regarding the second question. It is not an entirely satisfactory way in which to leave the case to the jury, but the trial judge sharply distinguished between the first question and the second. I do not see how the jury, in considering the second question, could well have been misled by what the learned trial judge had said about *res ipsa loquitur* and the burden of proof, which he distinctly confined to the first question. Neither was there anything to prevent the jury making any reasonable inference of negligence without special direction.

Notwithstanding the somewhat unsatisfactory way in which the matter was left to the jury, I should have little hesitation in finding that the answer to the second question, if warranted by the evidence, is sufficient to support a judgment for the plaintiffs, and that there is no ground of misdirection upon which it can be upset.

The jury, in considering its answer to question 2, had the right to draw reasonable inferences, such as the proper application of *res ipsa loquitur* would warrant, and the fact that the trial judge did not tell them so does not impair their answer. It cannot be said that the evidence for the defence was of a character that left no ground for a reasonable inference of negligence. The appellant's witnesses did not attempt to account for the accident, or to attribute it to any specific cause. They suggested a number of things that might have caused it, as, for example, some latent defect in the machine; "fatigue" in some metal part; physical col-

lapse of the pilot; some atmospheric condition. These were, however, little, if anything, more than a recital of the various things that may happen, but that rarely do happen, and of none of them was there anything outside the accident itself, to suggest its presence here. There was also evidence from the same witnesses that the operation of landing requires great skill and care on the part of the pilot. One of the dangers is that in manœuvring to come properly to the runway, the pilot may make too short a turn and "stall" his aeroplane—not the engine—and a sudden dive is apt to follow. This is exceedingly dangerous if it occurs at 800 feet or less from the ground, for it may be impossible to recover control and sufficient speed to get into the air again. Some of the appellant's witnesses told on cross-examination of other difficulties that they themselves had been in, resulting from their own mistakes. It is, in my opinion, impossible to say that the jury could not, on this evidence, have found, as they evidently did find, that the appellant had not given any reasonable explanation of the accident, and that the proper inference was that it was caused by appellant's negligence. That is the finding of the jury in the answer to the second question.

The jury's answer to the third question has given me more concern, for I think it must be read with the answer to the second. The appellant contends that the answer to the third question cannot be supported upon the evidence.

In a case where *res ipsa loquitur* applies, it would seem improper to require that the plaintiff should make out such a case as would enable a jury to answer the third question. The plaintiff does not know in what the negligence consisted, and if the defendant knows he probably will not tell. Where, however, as here, the question has been asked and is answered, the defendant may be within his rights in contending that the two answers must be read together, for the answer to the third question indicates what the jury had in mind in answering the second, and if what is found in answer to the third question is not supported by any evidence, or does not constitute negligence in law, no effect should be given to the answer to the second question. On the other hand, it may be said that the third question should not have been put at all, but, having been asked, the jury felt bound to find an answer to it, and simply did the best they could, although in fact the evidence did not enable them, with any assurance, to name

any specific act of negligence. *Res ipsa loquitur* would still justify the answer to Question 2.

In this connection the appellant cited the case of *Andreas v. Canadian Pacific Railway Company* (1905), 37 S.C.R. 1, 5 C.R.C. 450, where it was held that the finding of the jury in favour of the plaintiff, specifying some one or more acts of negligence, is deemed to negative the existence of any other acts of negligence charged. In my opinion this principle has no application here for the simple reason that the respondents did not allege any specific acts of negligence; they knew of no specific acts of negligence, and there are none to negative.

After much consideration, I have concluded that, giving to the jury's answer to the third question, that fair and liberal interpretation, in the light of the evidence and of the circumstances, to which a jury's verdict is always entitled, there is a sufficient finding of negligence that is supported by evidence. The negligence, if there was negligence, on the part of the pilot, consisted in getting his aeroplane into a position of danger from which he could not extricate it. The jury say the pilot made an error in judgment and brought the plane too low. I do not think the jury are necessarily to be taken to have meant that purposely the pilot brought the plane too low. Fairly, the words may mean that he allowed the plane, while in his charge, to get too low. The use of the words "error in judgment" creates no difficulty, for while an error of judgment is not necessarily negligence, the jury have already, in their answer to question 2, classed this error in judgment as negligence.

Having in mind that this is a case where *res ipsa loquitur* is applicable, I am of the opinion that there is sufficient specification of the negligence that caused the accident, and that it is justified by the evidence, as a reasonable inference.

Some argument was addressed to us with respect to a condition of the tickets upon which the respondents' husbands were travelling, which, it is contended, relieves the appellant from liability for any injury or damage unless occasioned by its own neglect of duty in the operation or control of the aeroplane. It is not conceded for the respondents that the condition is a valid one, but assuming that it is, the verdict of the jury is that there was such neglect. Any verdict that would support a judgment upon this record would, of necessity, involve a finding of negligence. This particular defence would seem to have no real value to the

appellant in these actions, which are founded upon negligence. If there was no negligence, the actions fail without the condition.

In the results the appeals fail, and should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the plaintiffs, respondents: Aylesworth, Garden, Stuart & Thompson, Toronto.

Solicitors for the defendant, appellant: Hughes, Agar & Thompson, Toronto.

[McTAGUE J.A.]

Re Russell.

Succession Duties—Property Liable—Shares in Foreign Company—Transfer Office in Province—Right of Company to Require Consent from Succession Duty Authorities of Province in which Head Office Situated.

Where shares in a company having its head office in Quebec are transferable in Ontario, and certificates, endorsed in blank for transfer, are found in Ontario on the death of the registered owner, who was domiciled in that Province, the Ontario transfer agent of the company is not entitled, even if so instructed by the company, to require a consent from the Quebec succession duty authorities before transferring the shares into the name of the executrix of the owner. It is clear, under *Williams v. The King*, [1940] O.R. 403, [1941] 1 D.L.R. 22, affirmed [1942] 2 W.W.R. 321, [1942] 3 D.L.R. 1, and *Re Thoburn; Ivey et al. v. The King*, 66 Que. K.B. 37, [1939] 1 D.L.R. 631, that the shares are not subject to duty in Quebec, and the company cannot impose a condition on transfer in Ontario which is not imposed by law, even in obedience to the dictates of a taxing department in another Province.

Mandamus—Order under Rule 622—Appropriateness of Remedy—Compelling Transfer of Shares—Facts Not in Dispute—Jurisdiction—Foreign Company—Shares Transferable in Ontario.

An order in lieu of *mandamus*, under Rule 622, is an appropriate remedy to compel the transfer of shares in a company, where the facts are not in dispute and no further action is necessary to ascertain them. The fact that the company in question is a foreign one, not doing business, in the ordinary sense, in Ontario, is immaterial, if there is a transfer agent in Ontario, and the company has caused share certificates to be issued, stating unequivocally that they are transferable in Ontario.

A MOTION under Rule 622 by the executrix of the estate of Delbert Glenn Russell, deceased, for an order in lieu of *mandamus*, directing The Eastern Trust Company (hereafter referred to as the trust company), registrar and transfer agent of Siscoe Gold Mines Limited (hereafter referred to as Siscoe) to transfer 200

shares of Siscoe, owned by the deceased and registered in his name, to the name of the applicant.

Siscoe was incorporated under the laws of Quebec, and its head office was in that Province, but the trust company, as its transfer agent, had an office in Toronto, and the share certificates stated on their face that they were transferable either in Montreal or in Toronto. The share certificates belonging to the deceased were found at his death in Toronto, and were endorsed by him for transfer.

The trust company refused to register the transfer, although consents were filed from both Ontario and Dominion succession duty authorities, until a consent was also obtained from the Quebec authorities. This refusal was apparently based upon instructions given to Siscoe by the Quebec authorities.

14th April 1942. The motion was heard by McTAGUE J.A. in Weekly Court at Toronto.

R. M. W. Chitty, K.C., for the applicant.

R. H. Sankey, K.C., and *S. H. Robinson*, for The Eastern Trust Company.

Subsequently, a direction was made that Siscoe be served with a notice calling on it to show cause why the order should not be made. This notice was duly served, and on 11th May a further argument took place, with the same counsel present, and *S. H. Robinson* also representing Siscoe. Written arguments were later submitted by counsel.

R. M. W. Chitty, K.C., for the applicant: Under the law as laid down in *Williams v. The King*, [1940] O.R. 403, [1941] 1 D.L.R. 22, affirmed [1942] 2 W.W.R. 321, [1942] 3 D.L.R. 1, the situs of these shares being in Ontario, and they being transferable there, they are in no way subject to the jurisdiction of Quebec in respect of succession duties. The applicant's right to deal with them without obtaining a release from that Province is clear.

A motion under Rule 622 is the appropriate remedy to compel the transfer of shares. *Re Hobbs* (1931), 39 O.W.N. 383, is distinguishable. See *Reg. v. Lambourn Valley Railway Company* (1888), 22 Q.B.D. 463; *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48 at 53, 2 D.L.R. 866; *Re Polson Iron Works Limited* (1912), 3 O.W.N. 1269, 22 O.W.R. 84, 4 D.L.R. 193; *Re Panton and Cramp Steel Company Limited* (1904), 9 O.L.R. 3.

R. H. Sankey, K.C., and S. H. Robinson, for the respondents: An application under Rule 622, which is a substitute for the old prerogative writ of *mandamus*, is not the proper procedure for obtaining the relief here sought. The writ would not be granted if the applicant had another effectual remedy, or where adequate relief could be obtained in an ordinary action, or to enforce a merely private right: *Reg. v. Lambourn Valley Railway Company, supra*; *Re Hobbs, supra*.

To make Siscoe subject to the jurisdiction of the Ontario Courts, it must be established that it is carrying on business within the Province, and no evidence to this effect is before the Court. The establishment of a transfer agency is not carrying on business. *Badcock v. Cumberland Gap Park Company*, [1893] 1 Ch. 362; *Fowble v. Chesapeake & O. Ry. Co.* (1926), 16 Fed. (2nd series) 504; *Wadsworth v. Equitable Trust Company of New York* (1912), 153 App. Div. 737. Service on Siscoe within Ontario will not bring the company within the jurisdiction of the Ontario Courts unless it is present in the Province, in the sense of being engaged in business there.

The completion or transmission and transfer requested in this case is beyond the scope of the trust company's authority under the agreement with Siscoe. It is not a simple transfer, such as is contemplated by the notation on the certificates. Siscoe being a creature of the laws of Quebec, the formalities to be complied with in the case of a transfer of shares on the death of a shareholder must be determined by the laws of that Province.

R. M. W. Chitty, K.C., in reply: It is immaterial whether or not Siscoe is carrying on business in the Province. It has been made a party, not because relief is claimed against it, but because it is the person interested in showing the Court that the applicant is not entitled to the transfer. The transfer agent, having merely ministerial duties to perform, is not in a position, and is not interested, to raise questions as to the applicant's rights. The cases cited for the respondents are clearly distinguishable.

Cur. adv. vult.

2nd July 1942. McTAGUE J.A.:—This is an application under Rule 622 for an order directing The Eastern Trust Company, registrar and transfer agent of Siscoe Gold Mines Limited, to transfer 200 shares of Siscoe Gold Mines Limited from the name

of Delbert Glenn Russell, deceased, to the name of the applicant, who is his executrix.

The following facts are not in dispute: Siscoe Gold Mines Limited is a company incorporated under the laws of Quebec, operating a mine in that Province. The Eastern Trust Company conducts a branch of its business in the City of Toronto, Ontario, and is transfer agent of Siscoe Gold Mines Limited. Delbert Glenn Russell was the owner, prior to his decease in November 1939, of certificates for 200 shares of Siscoe Gold Mines Limited. The certificates on their face are stated to be transferable either at Crown Trust Company, Montreal, or Chartered Trust and Executor Company, Toronto. The Eastern Trust Company succeeded Chartered Trust and Executor Company as transfer agent at Toronto. Delbert Glenn Russell was always domiciled in Ontario and the certificates at the time of his decease were found among his effects in Ontario. The applicant as executrix made application to The Eastern Trust Company at its Toronto office for transfer of the shares. At the time of the application she produced consents to transfer from the succession duty department of Ontario, and from the succession duty office of the Dominion. The Eastern Trust Company has refused to make the transfer until the applicant files a consent from the succession duty office of the Province of Quebec. The shares bear the endorsement in blank of the deceased to transfer signed 20th March 1939.

The above facts not being in dispute, there seems little doubt that there can be no liability to the Province of Quebec for succession duty. *Williams v. The King*, [1940] O.R. 403, [1941] 1 D.L.R. 22, recently sustained in the Privy Council, [1942] 2 W.W.R. 321, [1942] 3 D.L.R. 1; *Re Thoburn*; *Ivey et al. v. The King*, 66 Que. K.B. 37, [1939] 1 D.L.R. 631. Assuming that there is no liability for succession duty in the Province of Quebec, the question is whether the transfer agent, or the company, can make it a condition of transfer that the applicant furnish a clearance from the succession duty department of that Province. I think not.

Lest there should be any question that endorsement of the share certificates is a *sine qua non*, as seems to be suggested by the Privy Council in *Williams v. The King*, for some reason or other, I should point out that in this matter the certificates are so endorsed.

Although there has been argument to the contrary, it seems clear to me that this is a proper matter to be disposed of under Rule 622. There is no denial of the facts which I have stated, and there would appear to be no necessity for any action to further ascertain them.

Before parting with the matter I should say that when it first came before me Siscoe Gold Mines was not a party. Accordingly I directed service upon the company of a notice to show cause why the order sought should not be granted. The company subsequently appeared by counsel and also filed written argument. Its main contention was that it was not carrying on business in the Province of Ontario and was therefore not subject to the jurisdiction of this Court. It may not be carrying on business in the ordinary sense, but that is not the issue. The issue, it seems to me, is whether the applicant is entitled to transfer of the shares without imposition of an invalid condition. The company has disposed of these shares in this jurisdiction and has caused certificates to be issued to persons here, unequivocally representing that transfer may be made at the office of the transfer agent in Toronto. It cannot impose a condition on transfer in Ontario which is not imposed by law, even in obedience to the dictates of a taxing department in the Province of Quebec.

Accordingly there will be an order directing The Eastern Trust Company to transfer the shares without production by the applicant of any release from the succession duty department in Quebec.

The applicant is entitled to her costs.

Order accordingly.

Solicitors for the applicant: Chitty, McMurtry, Ganong & Wright, Toronto.

Solicitors for the respondents: Holden, Murdoch, Walton, Finlay & Robinson, Toronto.

[COURT OF APPEAL.]

Ontario Loan and Debenture Company v. Gray et al.

Mortgages—Foreclosure—Stay of Proceedings—Payment of “Amount then Due”—Rule 485—Application after Judgment and Taking of Possession—Acceleration Clause—The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, Schedule B.

Where an application is made for a stay of proceedings in a mortgage foreclosure action after judgment has been entered, “the amount then due for principal, interest and costs”, which, under Rule 485, the mortgagor must pay as a condition of obtaining the stay, is the amount found to be owing by the judgment. The fact that a large part of this amount is owing only by virtue of an acceleration clause in the mortgage is immaterial, and while the extended form of that clause in Schedule B to The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, indicates that there is a practice whereby relief may be granted on paying the amount which would be due apart from the acceleration clause, there is in fact no such practice. The rights of the parties have become merged in the judgment, and “the amount then due” can be ascertained only from the judgment, and not from the mortgage. *Todd v. Linklater* (1901), 1 O.L.R. 103; *Clemmer v. Panton* (1922), 52 O.L.R. 211; *Phelan v. Grant* (1922), 23 O.W.N. 345, considered.

Per Urquhart J.: A stay of proceedings cannot be granted after the mortgagee has entered into possession. (This point was not dealt with by the Court of Appeal).

AN appeal, by leave of Kelly J., from the order of Urquhart J. dismissing an appeal from the order of Ingram Co. Ct. J., sitting as Local Master of the Supreme Court, who dismissed the defendant's motion for a stay of proceedings in an action for foreclosure of a mortgage, but granted an extension of time for redemption.

27th and 30th March 1942. The motion was heard by INGRAM Co. Ct. J. as Local Master, in Chambers at London.

E. G. Moorhouse, for the plaintiff.

J. J. Gray, for the defendant.

23rd April 1942. INGRAM Co. Ct. J.:—This is a motion by the defendant G. H. Gray for an order staying the proceedings in this action and for such further and other relief as the Court shall deem proper.

The action is brought upon a mortgage, the principal of which is due by virtue of an acceleration clause, owing to default in payment. The plaintiff claims foreclosure, possession, and judgment against the mortgagor upon his covenant. Default of appearance having been made, judgment was signed for the relief claimed, with a reference to the Local Master. The plaintiff duly took possession of the mortgaged premises

under its judgment and proceeded to collect the rents and manage the property.

Pursuant to the reference, all the subsequent encumbrances were foreclosed, and the Local Master by his report appointed 31st March 1942 as the last day for redemption by the defendant, G. H. Gray, the owner of the equity of redemption.

The said defendant made two motions prior to the present one, in which he sought to stay further proceedings in this action. These two motions having been dismissed, the defendant then launched the present motion on 23rd March 1942. However, it is quite clear from the judgment of Middleton J., as he then was, in *Clemmer v. Panton* (1922), 52 O.L.R. 211, that the defendant is not entitled to this relief. At page 213 of this report, Mr. Justice Middleton said: "In *Wilson v. Campbell* (1893), 15 P.R. 254, the late Chancellor Boyd dealt with a similar question. The action was upon the covenant in a mortgage due by acceleration, and judgment had been signed. The Chancellor held that the Rules corresponding with Rule 485 had no application. The Rules relate to foreclosure and sale and possession of the property, and do not in terms speak of the claim on the covenant. This claim has passed into judgment, and is no longer money secured by the mortgage, and the Court has no power to interfere, either under the words of the covenant as expanded by the Short Forms Act or under the Rules."

The plaintiff since it obtained its judgment, as I have pointed out, has been in possession, collecting rents and managing the property, and has done so very efficiently. The amount claimed by the plaintiff in the writ, which was issued on 25th October 1940, was \$79,171.72. Then according to a report of the Local Master the amount necessary to redeem as of 24th June 1941 was \$82,584.05. However, out of the rentals collected, the amount due upon the mortgage as of 31st March 1942 was reduced to \$76,519.42. Or to put it another way, between 24th June 1941 and 31st March 1942 the amount of the mortgage has been reduced by \$8,492.13, or looking at the matter in still another way, the said defendant has reduced his liability as shown in the writ from \$79,171.72 as of 25th October 1940, to \$74,191.82 as of 31st March 1942, that is he has reduced his liability by \$4,979.90 and in addition he has already tendered to the plaintiff the sum of \$550 which, if paid, would make a total reduction of \$5,529.90.

In arriving at the above reduction of \$8,492.13, it should be noted that the payments no doubt included certain rentals which were collected by the plaintiff between the date of its judgment and 31st March 1942.

In addition to the sums which have been applied upon this mortgage, all overhead charges and practically all of this interest, and a large sum totalling many hundreds if not some thousands of dollars, has been spent in repairs to, and upkeep of, the mortgaged premises. No calculation has been made of the total of these amounts. But others are shown in detail in various notices of change of account in proceedings in the Master's office. In fact, the mortgagee, upon receiving the \$550 which has been tendered by the defendant, will have been paid practically every dollar that was due to it except the accelerated payment of principal under the mortgage, upon which it obtained judgment, and also has had the mortgaged premises kept in first-class repair. There is no suggestion that the mortgage security is not quite adequate or that the defendant, G. H. Gray, has not a substantial equity in it. If, in about a year and a half, this defendant has reduced his liability by over \$5,500 and there is every prospect of the same or a greater reduction within the next year, it seems a hardship to deprive this defendant of his right to redeem at this time. In January 1940, the plaintiff was content to take \$650 per month on account of principal and interest, and to accept payment of the balance at the end of five years; the plaintiff must have deemed its security quite adequate during that period.

However, undoubtedly the defendant Gray has caused the plaintiff company a great deal of trouble and annoyance by intermeddling with the tenants, and no doubt they felt that in the circumstances they were practically driven into getting rid of his interest in the property so that they might carry on undisturbed by him. Otherwise I am not able to understand why the plaintiff has departed from its usual fair and benevolent way of carrying on foreclosure proceedings in general. I do not suggest that there is anything unfair in the action which the plaintiff has taken in this matter.

In all the circumstances, I think an order should go directing that upon the defendant, George Howard Gray, paying to the plaintiff, within ten days from this date, the sum of \$550, and filing, within the same time, a written undertaking not to inter-

meddle in any way with the tenants of the mortgaged premises, the time for redemption of the mortgaged premises by the said defendant be extended for six months from 31st March 1942. Upon failure of the said defendant to make the payment and to file the undertaking as aforesaid, the motion will be dismissed.

The costs of this motion will be costs to the plaintiff, and will be added to the mortgage debt.

1st May 1942. The defendant's appeal, and the plaintiff's cross-appeal, were heard by URQUHART J. in Chambers at Toronto.

J. J. Gray, for the defendant G. H. Gray.

J. W. Pickup, K.C., for the plaintiff.

2nd May 1942. URQUHART J.:—Appeal by the defendant (by writ) from the judgment of the Local Master at London, refusing a stay of proceedings in this, a foreclosure action, and cross-appeal by the plaintiff against the said judgment in so far as the learned Local Master extended the time for redemption for six months on certain terms.

The mortgaged property is a large apartment house.

The writ of summons claiming foreclosure, payment and possession (the usual writ) was issued on 25th October 1940, claiming the sum of \$79,171.72, a large amount of which was due by virtue of an acceleration clause in the mortgage. Judgment for foreclosure and for possession was given, and the mortgagee has, since the judgment, had possession of the mortgaged premises, if indeed it did not have possession before action was brought.

All persons interested in the property, except the owner of the equity of redemption, have been foreclosed.

As a combined result of the management by the plaintiff in possession and payments by the defendant, only a small amount is required to reduce the amount due to the principal, payment of which was accelerated by virtue of the terms of the mortgage.

This amount has been tendered to the plaintiff, which has refused to accept it. The mortgagor has had a number of extensions of time, but desires a stay of proceedings as he claims to be able now to put the mortgage in what is generally referred to as "good standing".

The learned Local Master, in a written judgment, has refused to stay proceedings but has directed that on the defendant (by writ) paying the sum of \$550 to the plaintiff within ten days, and giving within the same time an undertaking not to intermeddle in the property, the time for redemption by the said defendant shall be extended for six months.

I have examined the authorities cited, and other authorities on the subject, but these do not, to my mind, quite touch the situation. The circumstances of each are different from the present circumstances.

I am of opinion that the combined effect of The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, Schedule B, clause 16, and of Rule 485 is that although the defendant may move to stay the action either before or after judgment, on payment of the amount then due for principal, interest and costs, yet if the writ of summons claims possession, and possession is recovered by the mortgagee, that relief is not open to the defendant, and the action cannot be stayed.

I regret the result of this opinion, because it places the mortgagor, when conditions are favourable, as they are at present, almost entirely at the mercy of the mortgagee, but I trust that the mortgagee will try to assist the mortgagor in this case as far as possible in working out the ultimate redemption of this valuable property.

The motion for a stay of proceedings must therefore be dismissed.

In regard to the cross-appeal, as I intimated on the argument, it had no chance of success, in view of the considerable equity in the property and the shortage of housing accommodation and general favourable conditions for renting an apartment building of this sort. It will also be dismissed.

The time for compliance with the terms of the Local Master's judgment will be extended for a further ten days from the date hereof.

As success was evenly divided, there will be no costs of the appeal or cross-appeal.

8th May 1942. The defendant moved for leave to appeal from this judgment, and the motion for leave to appeal was heard by KELLY J. in Chambers at Toronto.

The same counsel appeared.

8th May 1942. KELLY J. (orally, at the conclusion of the argument):—This is an application by the defendant mortgagor for leave to appeal from the decision of Mr. Justice Urquhart, dismissing an appeal from the judgment of the Local Master at London, who refused a stay of proceedings in an action on a mortgage where possession, judgment on the covenant, and foreclosure were all claimed in one action.

The facts are fully stated in the reasons of Urquhart J. A very large amount of money is involved—almost \$80,000. The mortgagee is in possession, collecting the rents and profits. The Local Master, in refusing the stay, extended the time for redemption a further six months, in effect giving a temporary stay for that period.

The mortgagor contends that by virtue of the provisions of Rule 485, if he pays all arrears due under the mortgage, apart from the acceleration clause, he is entitled to have the action for foreclosure stayed. He does not contend that he can in this way interfere with the judgment on the covenant, and if I understand him correctly, he does not contend very strongly that he can interfere in any way with the judgment for possession. He points out that six months from now, under the decision of the Local Master, he will be required to pay the full sum of \$80,000 or lose his property, and that the judgment of Mr. Justice Urquhart, if left standing, may seriously prejudice him if this motion is renewed before another judge at the end of the six months' period.

Counsel agree that there is no reported case exactly determining the effect of Rule 485 so far as it bears on the precise issue raised here. Counsel for the mortgagor cites a number of cases not directly in point, but indicating some support for his contention upon this motion.

In my opinion the matter is of great importance, not only to the litigants here concerned, but to the profession, and it is most desirable that the Court of Appeal should settle definitely the exact scope and effect of Rule 485. The cases cited by counsel for the mortgagor do throw sufficient doubt on the decision of Urquhart J. that I think leave to appeal should be given under Rule 493.

Costs of this application must be left to be disposed of by the Court of Appeal.

2nd June 1942. The appeal was heard by RIDDELL, McTAGUE and GILLANDERS JJ.A.

J. J. Gray, for the defendant, appellant: Rule 485 applies to three separate actions: (a) for foreclosure; (b) for sale; and (c) for recovery of possession. It is designed to extend the time in which the mortgagor may pay up arrears. In an action for sale, the mortgagor has until the sale, while in foreclosure he has until the time of foreclosure. The appellant in this case has not been given the time to which he is entitled. The English cases draw a clear distinction between conditional possession, which comes with the judgment *nisi*, and absolute possession, which is recovered only with the final order of foreclosure or after it. This order is the final judicial act in an action for foreclosure. Similarly, the "recovery of possession" within the meaning of Rule 485 means the last judicial act in the action, after judgment, and while possession may be taken before judgment, it is only conditional at that stage. The Rule was obviously intended to keep the mortgagor from suffering by reason of the acceleration clause, by extending the time for redemption. It adds to the specific time mentioned in clause 16 of Schedule B to The Short Forms of Mortgages Act, R.S.O. 1937, c. 160, the further period "until judgment". In a foreclosure action, the mortgagor has an additional six months from the date of judgment, and surely the mortgagee cannot destroy this right by simply going into possession. Rule 485 must be intended to give the mortgagor the time until the final order, and could not have been designed to take from him the privilege to which he is entitled under the principle of *Phelan v. Grant* (1922), 23 O.W.N. 345, simply because the mortgagee has gone into possession. See also *Hazeltine v. Consolidated Mines Limited* (1909), 13 O.W.R. 994; *Croft v. Neville* (1927), 32 O.W.N. 58.

The Local Master did not exercise his discretion against granting the stay but considered that he was precluded by *Clemmer v. Panton* (1922), 52 O.L.R. 211. If that case did not prevent it, he should be given an opportunity to exercise his discretion. I refer to *Wilson v. Campbell* (1893), 15 P.R. 254 at 257.

J. W. Pickup, K.C., for the plaintiff, respondent: A judgment for possession, unlike a judgment for foreclosure, is not a judgment *nisi*. In the circumstances of this case, there should be no interference with the mortgagee in possession. The mortgagor

is endeavouring to take advantage of the mortgagee's care and improvement of the property. The trial judge protected the mortgagor's rights as to redemption, but refused to interfere by staying the action.

Under Rule 485 "the amount then due" includes the accelerated principal, being determined by the amount of the judgment on the covenant: *Clemmer v. Panton, supra*. It is only before sale or foreclosure or recovery of possession that the mortgagor may move to stay. The order giving the mortgagee possession should not be disturbed. [McTAGUE J.A.: Are you suggesting that once the mortgagee takes possession this becomes a final order? Judgment for possession is conditional, and Rule 485 gives the Court the right to make certain orders at any time after judgment]. Only redemption can defeat the right of possession. The mortgagee cannot interfere with redemption, but on the other hand there is no reason why the mortgagee should go out of possession. By the very terms of Rule 485, the amount due for principal, interest and costs must be paid before a stay is granted. Both Bastedo on Mortgages, p. 127, and Marriott's Practice in Mortgage Actions, 1938 ed., p. 243, refer to an unreported decision in *Burke Investments Limited v. Harry* in this connection. "The amount then due" has passed into a judgment on the covenant, and includes the accelerated principal: *Clemmer v. Panton, supra*; Falconbridge, Law of Mortgages, 1919 ed., p. 446.

The words in the extended form of the acceleration clause (clause 16 of Schedule B to the Act), "within such time as, by the practice of the Supreme Court, relief therein could be obtained", do not extend the time provided by the clause for the payment of arrears, beyond judgment, and in order to derive the benefit of the relief against acceleration under that clause, the arrears must be paid before the amount due has been embodied in a judgment. The mortgagee's right to sell cannot be interfered with: *Tylee et al. v. Hinton* (1878), 3 O.A.R. 53. Neither can the claim under the covenant.

J. J. Gray, in reply: *Todd v. Linklater* (1901), 1 O.L.R. 103, establishes that the mortgagor's right under the extended form of the acceleration clause continues, under Rule 485, beyond judgment. This case, together with *Phelan v. Grant, supra*, and *Hazeltine v. Consolidated Mines Limited, supra*, make it clear that the words "then due" in Rule 485, read with the extended

form of the acceleration clause, mean the amount actually due, without acceleration of the principal.

Cur. adv. vult.

13th June 1942. The judgment of the Court was delivered by

MCTAGUE J.A.:—The action is the usual mortgage foreclosure action. Judgment by default was obtained on the 12th day of November, 1940. By it the plaintiff obtained judgment on the covenant and judgment for possession with the usual reference to the Master. Since entering into possession of the premises the mortgagee has succeeded in reducing the mortgage indebtedness to a point where by the payment of some \$550 the mortgagor could pay up the principal and interest in arrear if the amount due is not the full amount of the mortgage on account of the operation of the acceleration clause now translated into a judgment. This amount of \$550 he tendered to the plaintiff together with costs and moved before the Local Master at London, Ontario, His Honour Judge Ingram, for a stay of proceedings under Rule 485.

Judge Ingram refused to grant a stay, but extended the time for redemption until the 30th day of September, 1942. From this order an appeal was taken by the defendant to the Honourable Mr. Justice Urquhart, and a cross-appeal was taken by the plaintiff against the extension of time for redemption. Mr. Justice Urquhart dismissed both appeals. The defendant having obtained leave from the Honourable Mr. Justice Kelly, appeals to this Court from that part of the order refusing the stay.

The question involves a consideration of Rule 485, which reads as follows:

"485. (1) In an action for foreclosure or sale, or for recovery of possession of any mortgaged property for default in the payment of interest, or of an instalment of the principal, the defendant may, before judgment or after judgment, but before sale or final foreclosure or recovery of possession of the mortgaged property, move to stay the action upon payment of the amount then due for principal, interest and costs.

"(2) Any action so stayed may upon subsequent default in the payment of a further instalment of the principal, or of the interest, be proceeded with by leave of the court."

As Dean Falconbridge points out in his *Law of Mortgages*, 3rd ed., at p. 445, the important words for consideration are "the amount then due". Before judgment the amount then due may be ascertained by reference to the mortgage itself, or, in the case of a mortgage under The Short Forms of Mortgages Act as this one is, to the acceleration clause contained in Schedule B of that Act. See *Todd v. Linklater* (1901), 1 O.L.R. 103. Once judgment has been taken out it seems to me that the rights of the parties under the mortgage have become merged in the judgment, and in order to ascertain the amount then due reference cannot be made back to the mortgage but must be confined to the judgment and the Master's report.

The principle has been touched on in a number of cases. In *Clemmer v. Panton* (1922), 52 O.L.R. 211, Mr. Justice Middleton held that after judgment the mortgagor is not entitled to the relief contemplated in the acceleration clause as extended in the Short Forms Act because the rights under the mortgage had become merged in the judgment. The case dealt with the action on the covenant specifically. In *Phelan v. Grant* (1922), 23 O.W.N. 345, a stay was granted but an execution in the hands of the sheriff was ordered to stand. It is somewhat difficult to determine precisely what was decided in the case because the report is so very brief. Whether there was the usual acceleration clause does not appear, although it seems there was a claim for accelerated principal. If the acceleration clause was the usual one, then the decision would seem to be somewhat questionable.

In the case at bar the only practical relief the defendant could assert as the result of the stay would be to go back into possession. As Mr. Justice Kelly and Mr. Justice Urquhart have both pointed out, there do not seem to have been any cases decided where Rule 485 has been set up as justification for the defendant being able to recover possession after or before judgment.

While the wording of the acceleration clause as extended in the Short Forms Act "*but that in such case the said mortgagor, his heirs, executors, administrators or assigns, shall on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered or within such time as, by the practice of the Supreme Court, relief therein could be obtained*" be relieved from the consequences of non-payment of so much of the money secured by

these presents, or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time", would seem to suggest that there is some practice in the Supreme Court by which relief can be obtained after judgment without paying the full amount, I am unaware of there being any such practice. Once a judgment has been entered I do not think a mortgagor is entitled to a stay under Rule 485 on payment of any lesser amount than the amount of the judgment. This seems to me to be the correct principle whether the action is on the covenant or whether it is for possession or whether it is for foreclosure or, as in the usual action, for all three. What is left to the defendant after judgment in the usual foreclosure action is the right to redeem in the usual way because *the amount then due* is the amount of the judgment. Of course if the action were for the recovery of past due instalments only, the relief contemplated by Rule 485 after judgment would be quite applicable. I feel somewhat fortified in the view that this is the law after reading the observations of Dean Falconbridge in *Law of Mortgages* at the page above referred to.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Jeffery & Jeffery, London.

Solicitor for the defendant, appellant: J. J. Gray, Toronto.

[ROSE C.J.H.C.]

Corporation of The Village of Swansea v. Gamble.

Taxation—Municipal Real Property Assessment—Allegation by Assessed Owner that he Holds as Trustee only—The Assessment Act, R.S.O. 1937, c. 272, ss. 36(11), 99, 100.

Trusts and Trustees—Constitution of Trust—Resulting or Implied Trust.

The defendant acquired land at a tax sale in 1935. The purchase was made as the result of an arrangement made between the defendant and A., the chairman of a club of which the defendant was a member, and the intention was that the defendant should hold this land until such time as the club should be able to take it over for use as a football field, and that these facts should be kept secret until that time. The arrangement was informal, and no details were settled as to the length of time for which the defendant should hold the land, or what was to happen if the club could not, or did not, take it over. The defendant was assessed as owner from the date of purchase, and this action was brought for taxes imposed in the years 1936 to 1940, inclusive.

Held, in the circumstances, fully discussed in the judgment, the defendant was not a trustee of the land, within the meaning of s. 36(11) of The Assessment Act, R.S.O. 1937, c. 272, which limits the personal liability of a trustee to the amount of trust property in his hands. He was not a trustee for A., who had not advanced the money for the purchase, and there was clearly no intention by anyone that he should hold it, from the moment of purchase, only as trustee for the club.

AN action for arrears of taxes, interest and penalties. The facts are fully stated in the judgment.

9th, 10th and 11th December 1940. The action was tried by ROSE C.J.H.C. without a jury at Toronto.

J. J. Addy, for the plaintiffs.

D. R. Michener, for the defendant.

11th July 1942. ROSE C.J.H.C.:—This is an action by the Municipal Corporation of the Village of Swansea for arrears of taxes and for penalties for non-payment. The defendant was at the relevant times assessed as owner of the land in respect of which the taxes were imposed, and the only real question is that raised by his plea that he is not and has never been the owner except as trustee and that he has no trust property available for payment of the sums claimed.

In the year 1935 and before and afterwards, the defendant was a member of the Argonaut Club and took a good deal of interest in its affairs. The club's activities are in rowing and football. It was in the football that the defendant was especially interested. The organization of the club was not very precisely described at the trial, but it appeared that what was, perhaps

loosely, called the football club was managed by a committee of the rowing club, of which committee Mr. T. H. C. Alison, the president of the Argonaut Rowing Club, was chairman. He and Dr. Kinsella and the secretary of the club were the active members of the committee; the other members, as Mr. Alison says, leaving the decision of most questions to these three.

In 1935 a sale of the land in question and other land for arrears of taxes was advertised. Mr. Alison and his two associates thought that the land in question would be, to use his expression, ideal for the purposes of the football club, and they thought that the interests of the Argonaut Club would be served if the land could be acquired, and its acquisition kept secret until such time as the club should be in a financial position to take it over. No definite time was discussed, but Mr. Alison appears to have had in mind a period of perhaps two or three years. In 1935, the club, so Mr. Alison says, "had not a red cent" available; and there was no certainty that it would ever have money available for the purchase of a football field.

In the circumstances, naturally, the project was not discussed at any meeting of the members of the Argonaut Club; and there was no formal discussion of it even at a meeting of the football committee; so that there is no room for a suggestion—and no suggestion is made—that the club or its members, or even the members of the football committee, as such, came under liability to anyone in respect of what afterwards was done.

The defendant was a mining broker; business such as his was better at the time than it was later on; and he was, as he puts it, in "affluent" circumstances. Shortly before the time of the sale, which was held on 12th December 1935, Mr. Alison mentioned the project to him, describing it briefly, and asked him whether he would "finance" it, *i.e.*, whether he would buy the land at the tax sale and hold it until the club should be prepared to take it over, maintaining secrecy meantime as to his object in purchasing. The conversation was a very loose one: there was no statement that the defendant was to be a trustee for anyone; no limit was set to the time within which the club might exercise the privilege of taking over the property; and nothing was said as to what should happen if the club should not desire, or be able, to take over. The defendant expressed a willingness to do what was proposed, and it was arranged that on the day of the sale Mr. Alison should show

him the property and, at the sale, as each parcel was put up, should tell him whether it was one of those for which he was to bid. This arrangement was carried out, and the defendant became the purchaser of some forty parcels, and was given, as I think, although there is a conflict of testimony as to this fact, the certificates called for by s. 170 of The Assessment Act, R.S.O. 1937, c. 272. I think that what purport to be duplicates of these certificates, produced by the treasurer at the trial and marked exhibit 6, were prepared in the manner stated by the treasurer, and that they are fairly accurate copies of the originals handed to the defendant. I do not think that on the day of the sale, or, indeed, at any time prior to a meeting of the finance committee of the council held in May, 1940, at which he was present, the defendant informed the treasurer or any other representative of the municipality that he was purchasing, or had purchased, the lands for anyone other than himself.

The defendant paid the purchase price of the lands; the treasurer caused to be registered in the Registry Office the notices of sale provided for by s. 178(3) of the Act; and thereafter the defendant was assessed as owner. The taxes claimed in this action are those for which he was assessed for the years 1936 to 1940, inclusive. In February, 1937, he was notified by the treasurer, by letter, that the tax deeds were ready for delivery on payment of the charges (see s. 178(7) of the Act), but he did not answer the letter, and it was not until August, 1940, after the issue of the writ in this action, that he, through his solicitors, notified the treasurer that the conveyances were to be made to James J. Dolan "in trust". Mr. Dolan is the secretary of the Argonaut Club, and it was on the instructions, or at the request, of Mr. Alison that the defendant named him as the grantee. The land was conveyed to him, and he has been assessed for later taxes.

A few days after his purchase of the land the defendant gave, or as he says, lent, \$1,000 to Mr. Alison to be paid to the former owner as consideration for abstaining from the exercise of the right to redeem; and thereafter when any action had to be taken as regards the land the decision as to what should be done was left to Alison. The defendant, for instance, referred to Alison one or two persons who approached him in respect of the purchase of some of the lots; he wrote, in respect

of other matters, letters prepared or suggested by Alison; in 1938 he, or a secretary in his absence, paid, on Alison's advice, the taxes for the year 1935—no doubt for the purpose of avoiding the danger of a tax-sale; on one occasion in 1936 he, or his office, gave the council permission (as I understand the letters) to encroach to a certain extent when raising the level of neighbouring land belonging to the municipality; and in 1939 he made a proposal to the council to grant to the municipality, upon terms set out in his letter, the privilege of dumping waste upon the lands. On all these occasions, while the defendant acted as Alison advised (or instructed) him, he never suggested that he was not the absolute owner. On the contrary, his letters contain expressions such as "the lots which I own in the Village of Swansea." In 1940, shortly before the writ in this action was issued, he did, at a meeting of the finance committee of the council, make some disclosure of the purpose for which he had purchased the land, but nothing turns upon that, and it is not necessary to set out the circumstances in which the meeting was held, or the nature of the statements made.

By s. 36(11) of The Assessment Act it is enacted as follows:

"(11) Land held by a trustee, guardian, executor or administrator shall be assessed against him as owner or tenant thereof, as the case may require, in the same manner as if he did not hold the land in a representative capacity; but the fact that he is a trustee, guardian, executor or administrator shall, if known, be stated in column 6 of the roll; provided, however, that such trustee, guardian, executor or administrator shall only be personally liable when and to such extent as he has property as such trustee, guardian, executor, or administrator, available for payment of such taxes."

By s. 99, the taxes due upon any land may be recovered as a debt due to the municipality "from the owner or tenant originally assessed therefor and from any subsequent owner of the whole or any part thereof, saving his recourse against any other person"; and by s. 100, "The taxes payable by any person may be recovered with interest and costs, as a debt due to the municipality."

The word "owner", as used in the sections that have been mentioned, is not defined by the Act, and neither *Krumm v. Municipal District of Shepard et al.*, [1928] S.C.R. 487, [1928] 3 D.L.R. 887, nor any other case cited by counsel is at all

conclusive as to the meaning that, in the application of ss. 36, 99 and 100, ought to be attributed to it. But, certainly, the defendant acquired an interest when his bid was accepted and he paid the purchase price; and while that interest remained defeasible during the year by s. 177 allowed to the former owner for redemption, it was, in my opinion, such an interest as made it proper to assess the defendant as owner. Some one, surely, was assessable: it could not be the former owner, whose interest in the land the municipality had professed to sell, and unless the defendant was assessed there would be no one liable for such taxes as ought, during the year allowed for redemption, to be chargeable in respect of the land. By s. 171(1), the purchaser, on receipt of the treasurer's certificate of sale, becomes the owner of the land, "so far as to have all necessary rights of action and powers for protecting the same from spoliation or waste," until the expiration of the term during which the land may be redeemed; but I do not think that this statutory statement that he is to be the owner to that extent is to be taken as a statement that the sale shall not, during the term allowed for redemption, have also its logical effect of making him the proper person to be entered on the roll as owner, and thus made liable for such taxes as may be imposed; and so I think that the assessment upon which the plaintiffs' claim depends was regular, and, as has been stated already, that the only question for consideration is whether the land was held by the defendant as a trustee and the proviso in s. 36(11) is operative.

At the trial, the defendant, being asked for whom he would say he had held in trust, said that he supposed that he ought to say for Alison. I do not think that that supposition can possibly be correct. Mr. Alison may or may not have acquired a contractual right, enforceable notwithstanding the Statute of Frauds, to compel the defendant to convey to the club upon being reimbursed the amount of his expenditure. However, no question as to the existence of such a right has arisen or need be discussed. But Alison was not in the position of a person in whose favour a trust results from his advance of the purchase money—he had not even undertaken to repay the money paid by the defendant or any part of it—and there never was any intention on the part of anyone that he should possess a beneficial interest in the lands. If there was any *cestui que trust* it must have been the club.

An ordinary incident of a trust is the obligation of the *cestui que trust* to indemnify the trustee against expenses incurred by him in the due execution of his trust. But this obligation does not attach in the case of every trust; it may be excluded, for instance, by agreement, or by the incapacity, such as infancy, of the *cestui que trust*, or by special circumstances: *Re the German Mining Company; Ex parte Chippendale et al.* (1853), 4 DeG. M. & G. 19, 43 E.R. 415; *Hardoon v. Belilios*, [1901] A.C. 118; *Wise v. Perpetual Trustee Company, Limited*, [1903] A.C. 139. Therefore, the obvious fact that in the present case the club came under no such obligation is not conclusive of the question whether the defendant was trustee for the club. Nevertheless, the fact, in my opinion, has some significance. The very circumstance that the trust for the club, if it existed, would be a trust which lacked one of the features ordinarily found in a trust for a beneficiary who is under no disability indicates the necessity of careful scrutiny of the facts upon which the suggestion of the existence of a trust is based. My opinion, upon consideration of those facts, is that no trust was created.

The defendant desired to further the interests of the club. He believed that by procuring land which he could turn over to the club if and when the club desired and was financially able to become the owner of a football field he might advance those interests. But there was no intention that I can discover that, from the moment of its acquisition by him, the land should be owned by the club. The case, therefore, is quite unlike *James v. Smith*, [1891] 1 Ch. 384, and other cases cited by counsel. The defendant's motive, as has been stated, was to help the club. He thought that by acquiring and holding the land he would gain the power to help if and when the time came for the club to become the owner of a football field; but I cannot think that he ever intended to divest himself of the power, which, unless he was to be a trustee and nothing more, his title to the land would give him, to exercise some discretion on the question whether the club would be wise to acquire a site, or that particular site, for a football field. I think that to hold, in the circumstances, that the defendant in co-operating with Alison to acquire the means of benefiting the club made himself a trustee, and the club the equitable owner, would be to go beyond what has been decided in any case to which

counsel referred or that I have seen. *Largey v. Leggat* (1904), 30 Mont. 148; 75 Pac. 950, throws some light on the subject, although that case turns to some extent on the Statute of Frauds which, of course, is not pleaded by the defendant in the present case.

If the opinion just expressed is correct there is no need to discuss the question of estoppel raised by counsel for the plaintiffs, and as to it I say no more than that if I thought that the trusteeship had been proved I should hesitate, as at present advised, to base a judgment in favour of the plaintiffs upon a holding that the defendant was estopped from setting up s. 36(11) of the Act; because although it was natural enough for the representatives of the municipality, having in mind the defendant's acts and letters, to assume that he was the beneficial owner, there would be difficulty, as it appears to me, in the way of finding as a fact, upon the evidence, that the municipality, because of its erroneous belief, abstained from exercising, and so lost, any right which but for that belief it would have exercised or could advantageously have exercised, or that the municipality was otherwise prejudiced by the defendant's silence. However, as I have said, it seems to be unnecessary to pursue that subject.

The writ by which this action was begun was issued on 3rd June 1940; the statement of claim is dated 25th June 1940. In the writ, the plaintiffs claim for taxes for the years 1936 to 1939, \$7,141.04; for tax-sale costs, \$301.32; for interest for June 1940, \$30.86; and for the taxes for 1940, \$1,473.44; making (according to the writ) a total of \$8,916.66; and in a schedule of particulars forming part of the endorsement the portions of the \$7,141.04 and the \$1,473.44 claimed in respect of each several parcel of land are set forth, as is also the monthly interest claimed in respect of the arrears for the years 1936 to 1939 standing against each parcel; and the total of the monthly claims of interest (*i.e.*, the interest claimed in each month in respect of all the overdue taxes for the years 1936 to 1939, inclusive) is shown to be \$30.86. In the statement of claim the plaintiffs ask for judgment for the \$8,916.66 mentioned in the writ "with the addition of \$30.86 interest per month or part thereof after the end of June, 1940, and current penalties accruing on the 1940 taxes." At the trial there was no dispute as to the accuracy of the particulars given in the writ, though

in fact there is a clerical error; the four items which in the writ are said to amount together to \$8,916.66 really come to \$8,946.66. This error ought to be corrected. The correction being made, there is no difficulty in computing the sum for which judgment ought to be given in respect of the taxes, the expenses of sale, and the interest (or penalties) payable in respect of the taxes imposed in the years 1936, 1937, 1938 and 1939. This interest for the 24 months July, 1940, to June, 1942, inclusive, amounts to \$740.64, making with the \$8,946.66, \$9,687.30, for which there will be judgment. But the by-law, if one was passed under s. 113(2) of the Act, establishing the "current penalties accruing on the 1940 taxes" was not put in evidence, and there was no admission by counsel as to the amount of these "penalties". Therefore, unless the parties agree upon the amount—which it is to be hoped they can do—it will have to be ascertained by the Registrar when he is settling the minutes of judgment. A direction to him to ascertain it and include it in the amount for which judgment is entered will be endorsed on the record. The defendant was the "owner . . . originally assessed" for the taxes, and notwithstanding the change, or apparent change, in ownership he is, by s. 99, liable for them with interest, and the "penalties" are really interest at a rate fixed by by-law, and when the rate is known there will be no difficulty in ascertaining the amount.

The defendant must pay the plaintiffs' costs.

Judgment accordingly.

Solicitor for the plaintiff: J. J. Addy, Toronto.

Solicitors for the defendant: Lang & Michener, Toronto.

[COURT OF APPEAL.]

**Montreal Trust Company v. The Oxford Pipe Line Company
Limited et al.**

Companies—Meetings—Quorum—Proxies—The Companies Act, R.S.O. 1937, c. 251.

The common law rule is that where the persons entitled to attend a meeting consist of a fixed number, exercising their powers in trust, a majority of those persons must be present to form a quorum, but that where the number is indefinite or fluctuating, and there is no contrary provision made by statute, charter or by-law, this rule is inapplicable, and the majority of those present can validly transact business. *Rex v. Bellringer* (1792), 4 T.R. 810, 100 E.R. 1315; *Rex v. Varlo* (1775), Cowp. 248, 98 E.R. 1068; *Rex v. Miller* (1795), 6 T.R. 268, 101 E.R. 547, applied. The shareholders of a company constitute such a fluctuating body, and it is therefore not necessary, in the absence of some special provision as indicated above, that 51 per cent. of the shares of the company should be represented at a shareholders' meeting.

A proxy which is made subject to a restriction as to voting is in direct violation of s. 52(4) of The Companies Act, R.S.O. 1937, c. 251, and is invalid and properly disallowed. *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230, followed. The fact that similar proxies have previously been accepted and voted upon is immaterial, since prior errors of judgment in this respect cannot abrogate the statutory provision.

An action was brought by the holder of the majority of the common shares of a company to set aside a resolution adopted at a shareholders' meeting for the voluntary winding up of the company. In addition to relying upon the two points of law set out above, the plaintiff asked, on equitable grounds, that the operation of the resolution should be stayed. *Held*, no case had been made out for such action by the Court, even if it had power to interfere with the operation of such a resolution on any ground short of invalidity of the shareholders' action. In the circumstances of this company, to uphold the plaintiff's contentions would deprive the holders of the preference shares, who had contributed the entire cash capital of the company, of all right to conduct the business of the company, and would force a risk upon them when there was no evidence that good would probably come of it.

AN appeal from the judgment of Hope J., [1942] O.R. 260, [1942] 2 D.L.R. 703, dismissing the action. The facts are fully stated in that report and in the judgment of Masten J.A. now reported.

23rd June 1942. The appeal was heard by ROBERTSON C.J.O. and MASTEN and GILLANDERS JJ.A.

D. L. McCarthy, K.C., for the plaintiff, appellant: The company has issued 1,100 shares of preference stock and 16,000 shares of common stock, each share, either common or preferred, being entitled to one vote. The plaintiff company holds 13,780 common shares, representing 80 per cent. of the total issue of shares, and 86 per cent. of the common shares. These shares are held by the plaintiff as a trustee for the creditors of Western

Ontario Natural Gas Company Limited (hereinafter referred to as the Western company). The trust deed contained provisions as to proxies to be given by the plaintiff in respect of shares of subsidiary companies standing in its name as part of the mortgaged assets. For some time before the meeting of 20th March 1942, proxies had been appointed according to the terms of the trust deed, including, as did the proxy here in question, directions that the proxy was not to be used in any way contrary to the trust deed. No objection was ever taken to the form of the proxy until this meeting.

If the proxy was defective, the meeting should have been adjourned, so that the holder of such a large percentage of the shares would not have been deprived of the right to vote. If shares or securities deposited as a pledge cannot be voted by proxy, no trust company will in future accept such shares as a pledge. The effect of the resolution passed at this meeting was that the assets of the company are to be sold. The mortgage and trust deed contain various provisions, one of which applies if the Western company fails to perform certain covenants; article 7 relates to subsidiary companies.

This Court can grant relief where people have acted under a mistaken view. It is the clear intention of the Ontario Companies Act that every shareholder shall have a voice in the affairs of the company. Where, by a mistake, the holder of more than 80 per cent. of the shares is deprived of a vote, the Court should adjourn the appeal so that a meeting may be properly held: *Harben v. Phillips* (1883), 23 Ch. D. 14. [ROBERTSON C.J.O.: It appears that the preferred shareholders were represented. The company is losing money, and the prospects of the common shareholders are not likely to improve. To give control to them in these circumstances might not be equitable. If they had been there, and had voted, the position would be different, but how can the Court interfere?] If at the end of six months it is obvious that the gas field has dried up, there could be no objection on anyone's part to the saving of all possible assets. There is some doubt whether the gas has in fact ceased to exist. [MASTEN J.A.: *Harben v. Phillips*, *supra*, was a very different case, for there the company was highly successful, and the dispute had to do with other matters.] The effect of the winding-up resolution is that the bondholders suffer and the common shares are rendered valueless, while the pref-

erence shareholders are paid. Time should be granted to try to preserve the company. The meeting should be held in June, and the judgment of this Court should be reserved until September.

The restrictions in this proxy were addressed, not to the person appointed, but to the Western company. The meaning of s. 52(4) of The Companies Act, R.S.O. 1937, c. 251, as interpreted in *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230, and *Re National Grocers Company Limited*, [1938] O.R. 142, [1938] 3 D.L.R. 106, is that a proxy shall not contain anything binding the company, as between itself and the shareholder giving the proxy. The words "subject to restrictions" on this proxy meant merely "subject to the instructions which we, as shareholder, give to you as our representative". The extraneous matter, to invalidate a proxy, must be in the body of the document itself, not merely written on the same sheet of paper. The restriction merely embodies what would in any case be the clear duty of the holder of the proxy. *Re Langley's Ltd.*, *supra*, is distinguishable on the facts.

A company incorporated under the Ontario statute consists of a definite number of corporate electors, and, the share being the voting unit, it is necessary to constitute a quorum that a majority of the voting shares should be represented. *Rex v. Bellringer* (1792), 4 T.R. 810, 100 E.R. 1315; *Rex v. Miller* (1795), 6 T.R. 268, 101 E.R. 547; *Howbeach Coal Company (Limited) v. Teague* (1860), 5 H. & N. 151, 157 E.R. 1136; 14 Corpus Juris, 895-897.

The learned trial judge misunderstood the effect of s. 51 of the Act. [MASTEN J.A.: The question is of the number of persons entitled to vote; it is not until a poll is demanded that s. 51 comes into play. Persons make the quorum, not the number of shares.] A poll was demanded at this meeting. The whole Act is in accordance with the common law. S. 17(2) applies only to a company of vague character—this company has a definite register of shareholders.

The proper way to deal with such a case as this, where the life of the company is at stake, is to decide what will cause the least hardship, and what is in the best interests of the company, and to decide this vital point only after proper investigations have been made.

G. W. Mason, K.C. (*T. M. Mungovan* with him), for the defendants, respondents, was not called upon.

At the conclusion of the argument, THE COURT delivered judgment orally dismissing the appeal with costs, and stated that reasons would be handed down at a later date.

15th July 1942. ROBERTSON C.J.O.:—I concur in the disposition of this appeal as stated in the judgment of Masten J.A., and in his reasons. I desire to say something in regard to the argument strongly pressed by Mr. McCarthy, that there was something in the nature of sharp practice in rejecting the 13,780 votes against the winding-up resolution, cast by the appellant's proxy, and that in the circumstances it is inequitable that there should be a winding up on so small a vote, when it is plain that the holder of the great majority of the shares intended to oppose it, and was unfairly prevented from voting. Mr. McCarthy urged that even if, technically, the winding-up resolution was carried at the meeting, and there was a quorum present, excluding the appellant's proxy, the Court should interfere to protect the appellant by at least ordering a stay of the winding-up, in the expectation of an improvement in the company's affairs that might make it possible to continue its business.

Even if the Court has power to interfere with the operation of a winding-up resolution passed by the shareholders on any ground short of invalidity of the action taken by the shareholders, there are facts in this case that make it impossible to say that in the result any wrong has been done the appellant, or that the equities of the case call for interference.

It is true that the company has issued and outstanding 16,000 common shares, of which the appellant holds 13,780, and that there are only 1,100 preference shares, some of which were not represented at the meeting. According to the affidavit of Ralph E. Still, filed by the appellant, the shares held by the appellant are 80.6 per cent. of the total issued stock of the company, both common and preferred. This is one way of putting it, no doubt, but it omits an important factor. As declared by the company's letters patent, the par value of a preference share is \$100, and the par value of a common share is \$1.00. There were originally 1,300 preference shares, representing \$130,000 of capital, and 20,000 common shares, representing \$20,000. By supplementary letters patent the capital

was reduced to 1,100 preference shares, representing \$110,000 of par value, and 16,000 common shares representing \$16,000 of par value. All the shares are issued. For the preference shares the company received their par value in cash, while the common shares were allotted for franchises and considerations other than cash. Dividends have been earned and paid on the preference shares, but none have been paid on the common shares, although a great majority of votes at the shareholders' meetings have been in the hands of the common shareholders. The uncontradicted evidence before us is that the company has of late been operating at a loss, and that there is no hope of a permanent betterment of its condition. The appellant urges that if time is given, something may turn up, but no one has ventured to pledge his oath to a reasonable expectation of any improvement.

The holders of preference shares appear to be the only shareholders who have any real financial interest remaining. To give to the common shareholders the delay that is asked would be wholly at the risk of the preferred shareholders, and it should not be forced upon them when there is no evidence that it is probable that some good will come of it.

It is of some interest to note that if effect were given to the appellant's contention that a majority of shares is necessary for a quorum at a general meeting, the holders of the common shares in this company or in fact this one shareholder could always prevent the holding of a general meeting by remaining absent. The holders of preference shares, who had contributed all the cash capital, could be placed in a helpless position, and prevented from exercising any of the powers of a general meeting.

MASTEN J.A.:—This is an appeal by the plaintiff from the judgment of Hope J. dated 28th April 1942, whereby the action was dismissed with costs.

The facts and circumstances are fully stated in the judgment appealed from and need not be here repeated, and it will be necessary to make only such brief statements as will suffice for the understanding of these reasons.

The endorsement on the writ of summons asks a declaration that the resolution alleged to have been passed at a special meeting of shareholders of the Oxford Pipe Line Company

Limited held on 20th March 1942, is invalid and of no effect, and for an injunction restraining the defendants and each of them from taking action pursuant thereto.

While the ostensible objective of this proceeding is for a declaration in the terms above indicated, yet in the alternative the appellant seeks to stay for some months the operation of the existing winding-up resolution, and to continue meantime the operation of the company in the hope that during the postponement an improved situation may develop.

The application before the Court below began as an application for an interim injunction restraining the liquidator of the company from proceeding with the winding up pending the trial of the action, but by consent the application was turned into a motion for judgment, and judgment was given accordingly in the terms above stated. In the course of his reasons Hope J. says ([1940] O.R. at p. 263): "it was fully agreed by counsel for all parties that the present motion be turned into a motion for judgment on the facts agreed". He also says that in arriving at his conclusion the Court's task is reduced to the answering of the following questions:

"(1) Was the proxy filed by the plaintiff for the 13,780 shares valid or invalid in law, because of the addition thereto and of the annexed document hereinbefore referred to?

"(2) If the proxy be declared invalid, did the meeting require a quorum of 51 per cent. of the issued capital stock in order that it could legally transact business?"

On the hearing of this appeal counsel for the appellant objected that the foregoing statements narrowed the questions to be determined beyond what was agreed, and he was permitted to argue, and he did argue as his first point, the alternative contention that in any event the appellant was entitled to a stay for some months of the winding-up resolution and to a continuance meantime of the operations of the company.

The present contest is between the preference and the common shareholders. The preference shareholders desire present realization. The common shareholders oppose this on the grounds above indicated.

The Oxford company was incorporated under the Ontario Companies Act, now R.S.O. 1937, c. 251, and the capital structure of the company consists of 1,100 issued preference shares and 16,000 issued common shares. On the argument it was

assumed by both the appellant and the respondents that the preference shares carried priority of claim in the winding up.

I deal first with the validity of the proxy given by the Montreal Trust Company covering 13,780 common shares which stand registered in its name. This proxy was disallowed at the meeting of shareholders and has been held invalid in the present action. These shares were transferred to the appellant company in trust as part of the security for a bond issue created by the owner of the shares, namely, The Western Ontario Natural Gas Company. The proxy in question reads as follows:

“THE OXFORD PIPE LINE COMPANY LIMITED

“100 Adelaide Street West

Toronto

“PROXY

“We, MONTREAL TRUST COMPANY, a Common Shareholder of The Oxford Pipe Line Company Limited, hereby appoint ALBERT FINK MILTON or failing him RALPH E. STILL, as our proxy to vote for us and on our behalf at the Special General Meeting of the Shareholders of the Company to be held on the 20th day of March, 1942, and at any adjournment thereof.

“DATED this 20th day of March, 1942.

“13,780

“Common shares held

“MONTREAL TRUST COMPANY

“J. F. Hobkirk

“Manager

L.S.

“G. F. Harkness

“Assistant Secretary.

“(Subject to the attached restrictions)”

The attached restriction above mentioned is in the words following:

“To—

“Western Ontario Natural Gas Co. Ltd.

“Take notice that the proxy attached hereto, given by this Company in favour of ALBERT FINK MILTON or failing him, RALPH E. STILL, with respect to a Meeting of Shareholders of The Oxford Pipe Line Co. Ltd. to be held on Friday the 20th day of March, 1942 at the hour of 11 o'clock in the forenoon (Toronto Daylight Saving Time) and at any adjournment

thereof, shall not be voted, exercised or used for any purpose inconsistent with the provisions or purposes of the Indenture dated as of the 1st day of May, 1939, from Western Ontario Natural Gas Company Limited (No Personal Liability) to Montreal Trust Company or any deed supplemental thereto.

“Dated at Toronto, Ontario, this 20th day of March, 1942.

“MONTREAL TRUST COMPANY

“J. F. Hobkirk

“Manager

L.S.

“G. F. Harkness

“Assistant Secretary.”

While the above direction is addressed to Western Ontario Natural Gas Company, none the less it is, in my opinion, a restriction on the voting power created by the proxy as signed, and that proxy could not be used otherwise than subject to the restriction. In other words, the proxy was dependent on the restriction. That being so it is directly in the teeth of s. 52(4) of The Companies Act, R.S.O. 1937, c. 251, which reads as follows:

“An instrument appointing a proxy may be according to Form 5 or such other form as may be prescribed by the by-laws of the corporation and shall not contain anything but the appointment of the proxy or a revocation of a former instrument appointing a proxy.”

Such being the facts, this Court is governed by the decision in the case of *Re Langley's Ltd.*, [1938] O.R. 123, [1938] 3 D.L.R. 230.

For these reasons, the opinion of the Court was that the proxy in question given by the Montreal Trust Company and sought to be voted upon at the March meeting of this company was invalid.

I deal in the next place with the argument of counsel for the appellant for delay, or more specifically that the present appeal should stand adjourned for some months with a stay of the winding-up proceedings, so far as realization of assets is concerned and with a continuance of operations meantime.

The respondent The Oxford Pipe Line Company Limited has been heretofore engaged in the natural gas business, including the conveyance of the gas to customers. The supply of natural gas in the fields operated by the respondent company

has been declining until at the present time further operations appear to be unprofitable. At least that seems to be the better opinion as indicated by the evidence, and is the opinion of the directors of the company. It was for that reason and with the view of stopping further loss in operation and of realizing such assets as are possessed by it and are saleable that the winding-up resolution was passed.

In support of that branch of his argument Mr. McCarthy submitted that on prior occasions when meetings of shareholders were held, a proxy in the form which is here in question and which had been declared to be invalid, was allowed and was voted and acted upon, and he suggested that in this way the holder of these shares was lulled into security. He submitted that on that footing the common shareholders were entitled to an adjournment and stay meantime, but it seems plain to me that prior errors of judgment on the part of the company in allowing and acting upon invalid proxies could not by any possibility abrogate the statute and give validity to the proxy here in question, which on its face is in violation of the prohibition created by the statute.

It may also be observed that the appellant did not, at the meeting of shareholders, ask for an adjournment of the meeting in order that it might obtain a proxy which avoided the objectionable feature, but on the contrary it proceeded with the meeting and took its chance.

No dividends have ever been paid on the common shares and no facts or even suggestions have been put forward in evidence to support the idea that through delay a more favourable situation might develop. On this ground, apart from anything else, this Court was unanimously of the opinion that the application for adjournment of the motion or for a stay of the winding-up ought not to be granted.

I proceed to deal with the objection that the resolution in question is invalid because the meeting of 20th March 1942 was, for lack of a quorum, without power to pass it. At that meeting of shareholders a motion was made pursuant to s. 175 of the Ontario Companies Act for the voluntary winding up of the company, and, the proxy from the Montreal Trust Company having been ruled invalid, the chairman declared the resolution to have been unanimously carried pursuant to

the report of scrutineer Mungovan. As appears by the minutes of the meeting his report reads as follows:

“And Mr. Mungovan reported to the Chair in writing as follows,—

“ ‘To Chairman Oxford Pipe Line Co. Ltd.

“ I report as Scrutineer there voted in favour of the Resolution.—

Personally	28	Votes
Proxy	1,093	“
	<u> </u>	
Total	1,121	“

demanded. See Masten & Fraser, *Company Law of Canada*, 4th ed., pp. 652 and 653.

The rule relied upon by the appellant is no doubt well and firmly settled, that when the persons entitled to attend and vote at a meeting constitute a fixed and limited body of persons exercising their powers in trust, a majority of the total body is essential to form a quorum. This rule goes back to very early days as illustrated by the cases of *R. v. Bellringer* (1792), 4 T.R. 810, 100 E.R. 1315, where Lord Kenyon in delivering the unanimous judgment of the Court quotes with approval and relies upon the words of Lord Mansfield in *R. v. Varlo* (1775), Cowp. 248, at p. 250, 98 E.R. 1068, where he says:

"Upon the words of the charter alone, I myself have no doubt about the construction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made. It is in the nature of all corporations to do corporate acts; and where the power of doing them is not specially delegated to a particular number, the general mode is, for the members to meet on the charter days, *and the major part who are present do the act*. But where there is a select body it is a different thing, for there it is a special appointment. All the reasoning therefore is different."

To the like effect is the judgment of Lord Kenyon C.J. in *R. v. Miller* (1795), 6 T.R. 268, at 278, 101 E.R. 547, where he says:

"The distinction between those cases where a corporate act is to be done by a definite number, and those where by an indefinite body, has been established in a variety of cases. Without going through them all I refer generally to that of *R. v. Bellringer*."

I refer to these very old cases as establishing the common law rule which in my opinion obtains in the present case, but they are supported by the subsequent decisions which have been collected in the factum of the respondent, which I have examined and with which I agree. I refer particularly to Palmer's *Company Precedents*, 15th ed., vol. 1, p. 648: "If there is no provision as to quorum in the articles two members are requisite to form a quorum. This is the common law rule." and to the like effect is Stiebel's *Company Law and Precedents*, 3rd ed., pp. 325-6.

In the present case it is my view that the voters entitled to attend and vote constitute a fluctuating body. Each shareholder is at liberty to vote as his own interests indicate, and the 51 per cent. rule which is applicable to close corporations such as are referred to in the case above quoted, and to a body such as a board of directors, has no application to a general meeting of shareholders, unless a certain percentage of the issued shares is expressly prescribed by statute, charter, or by-law.

The confusion that has arisen consists in looking upon the quorum as dependent upon the number of shares and not on the number of persons. The meeting is constituted not by shares but by persons, and the question of the number of shares represented only arises when a poll is demanded.

Under these circumstances it appears clear to me that, as pointed out in the Court below, the meeting having been duly summoned and there being present in person at least six shareholders holding shares on which they were entitled to vote, and holding valid proxies to the number of 1,093, a proper quorum was, in the circumstances, present at the meeting, and the meeting was validly constituted for the passing of the resolution in question.

For these reasons the Court was of opinion that the appeal should be dismissed with costs.

GILLANDERS J.A.:—I am in agreement both with the conclusion and reasons of Mr. Justice Masten, and with the additional observations of my Lord the Chief Justice.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the defendants, respondents: T. M. Mungovan, Toronto.

[GREENE J.]

Gooderham & Worts, Limited v. Canadian Broadcasting Corporation.

Radio—Powers of Commission and Corporation—Statutory Restrictions—Lease of Station—Liability under Covenants — Keeping Station “modern and up-to-date”—The Canadian Radio Broadcasting Act, 1932 (Dom.), c. 51, s. 9; 1932-33 Am., c. 35, s. 2; 1935 Am., c. 65, s. 1—The Canadian Broadcasting Act, 1936 (Dom.), c. 24, s. 25.

S. 9 of The Canadian Radio Broadcasting Act, 1932, c. 51, as amended by 1932-33, c. 35, s. 2, empowered the Canadian Radio Broadcasting Commission to acquire existing stations by lease or purchase, subject to the approval of the Governor in Council. *Held*, approval having been given to a proposal to lease a station, for a term and at a rent specified in the Order in Council, there must be implied in the Commission a power, without further express approval, to settle additional terms in the lease, in accordance with leasing practice.

A covenant by the lessee in such a lease “to keep the demised premises modern and up-to-date” implies more than a mere covenant to repair. It calls upon the lessee to make all expenditures within reason to keep the existing plant abreast with the broadcasting art, but does not require it to substitute a new station for the old.

AN action for damages under a lease. The facts are fully set out in the judgment.

16th to 21st December 1940 and 20th to 23rd January 1941. The action was tried by GREENE J. without a jury at Toronto.

W. N. Tilley, K.C., and W. J. Palmer, for the plaintiff.

John Jennings, K.C., R. L. Kellock, K.C., and F. W. Savignac, for the defendant.

3rd September 1942. GREENE J.:—The plaintiff as lessor and The Canadian Radio Broadcasting Commission as lessee executed a lease dated 15th May 1933, of the lands and premises and all plant and equipment owned and used by the plaintiff in connection with its broadcasting station situate in the town of Bowmanville, in the province of Ontario. By virtue of The Canadian Broadcasting Act, 1936 (Dom.), c. 24, which came into force on 2nd November of that year, the Commission ceased to have any existence, and the present defendant came into existence. The defendant continued the operation of the broadcasting station at Bowmanville from 2nd November 1936 to 15th May 1938, when it vacated possession following notice by it dated 26th January 1938, purporting to terminate the lease on 15th May 1938. The plaintiff relies on the possession by the defendant and on s. 25 of The Canadian Broadcasting Act, 1936, which reads as follows: “The Corporation shall, from the date of the coming into force of this Act, take possession of all prop-

erty and assets and assume all the obligations and liabilities of the Canadian Radio Broadcasting Commission", as binding the defendant under the lease to the same degree as the original lessee.

The plaintiff says that this lease was the formal settlement of an agreement to lease which was consummated on 19th May, while the defendant alleges that no contract existed until 16th June, when the lease bearing date 15th May was executed by the Commission. The point is of some importance as the leasing powers of the Commission were altered by legislation which came into force on 23rd May 1933.

The agreement to lease is alleged to have been made by the following letter and resolution of acceptance:

"Gooderham & Worts Limited

Toronto, 2. May 16, 1933.

"The Canadian Radio Broadcasting Commission,

"Ottawa, Ontario.

"ATTENTION LIEUT. COL. W. ARTHUR STEEL,

Commissioner.

"Dear Colonel Steel:

"With reference to my letter of the 10th instant to your Chairman and also to our conversation of this morning, I am prepared to recommend to our Directors a lease of Station CKGW on the following terms which I think will be acceptable to them:

"1. The lease to comprise the whole of the real estate, plant and equipment acquired for and used in connection with the operation of the Station, including the residence at Bowmanville occupied by the Station Engineer.

"2. The term of the lease to be five years from the 15th day of May, 1933, up to and including the 15th day of May, 1938, the Commission being obligated at the end of the term and at the end of each renewal term, either to renew the lease for a further term of five years at the same rental originally provided for by the lease, or to purchase the property comprised in the lease at a price to be agreed upon or in default of agreement to be settled in accordance with the provisions of The Dominion Expropriation Act, in which event the whole of the property

comprised in the lease is to be purchased, provided, however, that the Commission may at its option at any time during the original or any renewal term, purchase the said property comprised in the lease at a price to be agreed upon or settled as aforesaid.

"3. The rental under the lease to be \$12,000 per annum payable quarterly and the Commission to assume payment of taxes on the Bowmanville properties.

"4. The Station at all times to be kept modern and up-to-date and in good operating condition by the Commission during the term of the lease and any renewal thereof.

"5. The Commission to assume the following obligations of the Station, viz.: . . .

"KING EDWARD HOTEL

Lease runs to November 30, 1933, subject to yearly renewal, such renewals terminable by six months' notice. Rate \$200.00 per month. . . .

[There were a number of other contracts set out, but they have no bearing on this litigation.]

"6. The Commission agrees that with the exception of Mr. R. W. Ashcroft, Station Manager, the staff presently employed in connection with the operation of the Station will be continued by the Commission.

"If you will signify in the manner below indicated, the agreement of the Commission to the terms above outlined, I will present this letter as an offer to our Board of Directors at their next Meeting which will be held on Friday, the 19th inst. for acceptance and will have the lease prepared.

"Yours very truly,

"H. C. Hatch."

"Agreed, May 16, 1933.

"W. Arthur Steel,"

"Commissioner,

"Canadian Radio Broadcasting
Commission."

On 19th May 1933, the board of directors of the plaintiff company passed the following resolution:

"The President advised the Meeting that we had recently been approached by the Canadian Radio Broadcasting Commis-

sion with respect to the turning over of Radio Station CKGW to the Commission on a rental basis for a term of five years with the privilege of eventually purchasing the property and that at a Meeting this morning of the Board of Directors of our Holding Company that this Board is authorized to lease this Radio property for a term of years to the Canadian Radio Broadcasting [Commission] at a rental of \$12,000.00 per year on the understanding that the Commission continue to renew such lease from time to time at the same rental figures or eventually purchase the property at a price to be agreed upon or to be determined under the Expropriation Act of the Dominion of Canada.

"It was, therefore, resolved that this Company immediately enter into a lease with the Radio Commission accordingly and that the Vice-President and Secretary be and hereby are authorized to sign and seal such lease."

On the same day a draft lease was forwarded by the plaintiff company to the Commission for "consideration and approval". The position of the plaintiff is that at this time a binding agreement was entered into, subject only to the settlement of the formal terms of the lease.

Subject to its contention on other grounds that no valid contract was ever entered into, the defendant contends that no contract was entered into until the formal lease was executed, on three grounds, (1) that the Commission held no meeting nor passed any resolution authorizing the proposal signed by Commissioner W. Arthur Steel under date of 16th May 1933; (2) that the resolution was not an acceptance of the alleged offer in the letter of 16th May; and (3) that the lease as finally executed differed in material terms from the proposal of 16th May, being a new contract and not merely a formal settlement of an earlier agreement to lease.

Without being satisfied that the Commission could make a valid offer without a formal meeting or resolution, it is not necessary to discuss that because in my opinion the lease dated 15th May 1933, but executed on 16th June 1933, was not a formal settlement of a previous agreement, but a new arrangement between the parties, which became binding only on its execution.

The resolution is not worded as an acceptance, and indeed does not indicate that the letter of 16th May was before the directors. It is susceptible of the interpretation that it was an instruction to the officers of the plaintiff company to deal with

the Commission on the basis of certain main terms approved by the directors. On the same day Mr. Hatch who, although not an officer of the plaintiff company, was representing it in the negotiations, wrote to the Chairman of the Commission:

"As arranged with Colonel Steel [Vice-chairman of the Commission] on his visit here a day or two ago, I enclose herewith lease of Station CKGW for your consideration and approval."

It would not be right to lay too much stress on the form of this letter, but if the situation was as the plaintiff alleges it was, it seems more probable that the letter would advise that the company had accepted the offer of the Commission and that a lease embodying the agreement was enclosed. The form of resolution and wording of the letter of 19th May seem to contemplate that the negotiations would have final expression in the execution of a formal document. Although on the face of documents there may appear to be a complete bargain, yet where the parties contemplate ultimate expression in a formal document, they are not bound until such document is executed. *Queen's College v. Jayne* (1905), 10 O.L.R. 319; *Cushing v. Knight* (1912), 46 S.C.R. 555, 2 W.W.R. 704, 6 D.L.R. 820.

There are substantial differences between the letter of 16th May and the lease as executed on 16th June. In the letter the Commission was to assume taxes on the Bowmanville property; in the lease the Commission was to assume taxes on the "demised premises or upon the Lessor in respect thereof." In the letter the "Station" was to be kept modern and up-to-date, and in the lease it is "the whole of the demised premises". In the letter there is no provision as to insurance and under the lease the lessee is to insure the whole of the demised premises against loss by fire (the lessor to refund the proportion applicable to buildings), and in the event of damage or loss by fire, the lessee is to use the insurance money in rebuilding the demised premises and to make up any deficiency out of its own money.

In the letter the term is five years and to be renewed each five years, with the right to the Commission to purchase at any time on terms set out, but in the lease the term is three years, with a new provision that if at the end of any three year period a new lease is not entered into, the lessor may terminate the tenancy upon one month's notice. There are other differences between the letter and the lease, but it is not necessary to set them out.

It could not be seriously argued that a Court would insert the above terms in a lease being formally settled as the result of a direct acceptance of an offer in the terms of the letter of 16th May. The plaintiff's contention is that the letter and the resolution formed a binding contract which was not abrogated merely because the parties chose to agree to some other terms when settling the formal document. The facts just dealt with do not seem to support that contention, but rather my opinion expressed above that no contract existed prior to the execution of the lease.

The question as to whether a valid agreement was arrived at on 19th May 1933, is of further importance owing to the fact that the powers of the Commission were changed under legislation which came into force on the 23rd day of May 1933. If there was no agreement until 16th June, when the formal lease was signed, then of course the new legislation would govern.

In The Canadian Radio Broadcasting Act, 1932 (Dom.), c. 51, the powers of the Commission relative to the leasing or acquiring of broadcasting stations are as follows:

"9. The Commission shall have power to carry on the business of broadcasting in Canada and, without restricting the generality of the foregoing, may:

(a) make operating agreements with private stations for the broadcasting of national programmes;

(b) acquire existing private stations either by lease or, subject to the approval of Parliament, by purchase;

(c) subject to the approval of Parliament, construct such new stations as may be required".

By c. 35 of the statutes of 1932-33, which came into force on 23rd May 1933, paras. (b) and (c) as above set out were repealed, and the following paragraphs were substituted therefor:

"(b) Subject to the approval of the Governor in Council, acquire existing private stations either by lease or by purchase;

"(c) Subject to the approval of the Governor in Council, construct such new stations as may be required."

Counsel for the plaintiff contended that under the words of s. 9, "shall have power to carry on the business of broadcasting in Canada and, without restricting the generality of the foregoing, may", the Commission had power to do all things necessary to such purpose, and that the words in paras. (b) and (c) as they stood in either Act, cannot be taken to be a limitation

of the general powers. With that I am unable to agree, as it seems to me that the paragraphs are a definite interpretation placed on the general words by Parliament itself. In other words, under para. (b) of the Act of 1932, Parliament says that the general words do not authorize the Commission to purchase without the approval of Parliament, and under para. (b) of the Act of 1932-33, that it is not empowered to lease without the approval of the Governor in Council.

As in my opinion no valid agreement had been arrived at on 19th May, it is necessary to consider whether the lease actually executed on 16th June 1933, had the approval of the Governor in Council, as required by s. 9(b) in its amended form.

The Order in Council was dated 27th May 1933, and sets out the amended form of s. 9(b) which came into force on 23rd May 1933, as follows:

"The Commission shall have power to carry on the business of broadcasting in Canada, and, without restricting the generality of the foregoing, may:

"(b) Subject to the approval of the Governor in Council, acquire existing private stations either by lease or by purchase."

It then recites a recommendation by the Canadian Radio Broadcasting Commission for the leasing of Radio Station CKGW in Toronto from the firm of Gooderham and Worts for a period of five years at a price of \$12,000 per annum, "This lease to include the transmitting station and buildings in Bowmanville, Ontario, together with the studios, offices and equipment in the King Edward Hotel, Toronto." The operative part of the Order in Council is as follows:

"The Minister concurs in the recommendation as set forth above, and recommends that the Radio Commission be given authority to lease Station CKGW from Messrs. Gooderham and Worts, Toronto, for a period of three years at a price of \$12,000 per annum. This expenditure to be made out of monies appropriated by Parliament for the use of the Commission."

For convenience a partial summary of the lease as actually executed is set out below showing the clauses under discussion and where necessary quoting the exact words.

Date: 15th May 1933.

Parties: Gooderham & Worts Limited, lessor, and the Canadian Radio Broadcasting Commission, lessee.

1. Demised premises: Lands in Bowmanville "and all plant and equipment owned by the Lessor and used by it in connection with the operation of Radio Broadcasting Station CKGW, the whole of the said property being hereinafter referred to as the 'demised premises'."

2. Habendum: For three years from 15th May 1933 to 15th May 1936 at \$12,000 per year payable in advance in equal instalments of \$3,000 each on the 15th days of May, August, November and February in each year.

3. Covenant to pay rent and assumption of taxes and rates by the lessee (already referred to above).

4. "AND the Lessee covenants with the Lessor to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition."

6. Insurance clause already referred to.

12. "AND ALSO that at the expiration of the term hereby granted and of every succeeding term of three years to be granted by the Lessor to the Lessee as hereinafter provided the Lessor will at the costs and charges of the Lessee grant a new lease for a further term of three years from the determination of the present or then existing lease at the same rental per annum as provided for by the present lease irrespective of any buildings, erections and improvements erected or made thereon or therein by the Lessee, and the Lessee covenants and agrees to accept such new lease and to execute the same, and if no such new lease be entered into as aforesaid the present or then existing lease, as the case may be, and all the terms and conditions thereof shall continue until terminated by the Lessor upon one month's notice in writing to the Lessee. Provided, however, that the Lessor shall not be under any obligation to grant a new lease unless the Lessee shall have fully paid, observed and performed all rents, covenants and agreements contained in the present or then existing lease, as the case may be."

13. Option in favour of the lessee to purchase at any time during the currency of the lease or any renewal thereof and in the event of the parties failing to agree on the price the same to be fixed in the manner provided by The Expropriation Act, R.S.C. 1927, c. 64.

15. All new leases given in pursuance of the renewal clause are to contain the same covenants as in the original lease "includ-

ing the foregoing provisions as to renewal of lease and the foregoing option to purchase the demised premises”.

16. “THE Lessee covenants with the Lessor that it will indemnify and save harmless the Lessor against all loss, costs, charges, damages, expenses and liabilities whatsoever under the following agreements entered into or assumed by the Lessor in connection with the operation of Radio Broadcasting Station CKGW: . . .

“(2) Lease dated 1st December 1927 between The King Edward Hotel Company Limited and the Lessor, and Renewal thereof.”

The defendant takes the position (a) that the lease is so far outside the ambit of the Order in Council that it is void *ab initio*, (b) that the clause for renewal is void as creating a lease in perpetuity, and (c) that the word “price” as used in the Order in Council sets the limit to any annual expenditure that may be made by the Commission under the lease.

Dealing with (c) first, it seems too narrow an interpretation to place upon the word “price”. As I read the Order in Council it authorizes a lease for three years at a rental of \$12,000 a year. Admittedly the covenant to repair and keep the demised premises “modern and up-to-date” increases the annual cost to the Commission over the \$12,000. S. 9(b), as re-enacted on 23rd May 1933, provided that the Commission might acquire existing private stations by lease subject to the approval of the Governor in Council. The Governor in Council having approved of the length of the term and the amount of rent, it seems to me too narrow an interpretation of the legislation to say that the Commission did not have some discretion in regard to the other terms of the lease.

Leases always contain clauses other than the length of term and the amount of rent, so that, the Order in Council having dealt with these items alone, the exercise of a proper discretion by the Commission to settle other terms of the lease must be implied. That falls far short of the submission by the plaintiff that the approval of the Governor in Council is required to give capacity only and that, that having been given with a restriction as to rent and term, the Commission is free to settle any other terms not in conflict. (*Northern Ontario Power Co. Ltd. v. La Roche Mines, Ltd., et al.*, [1938] 3 All E.R. 755, [1938] 3 D.L.R. 657, [1938] 3 W.W.R. 252). It does seem reasonable, however,

to conclude that capacity having been given to lease a certain station subject to certain restrictions, the Commission then had discretion to settle the other terms in a manner reasonably in accord with leasing practice.

The covenant for perpetual renewal or purchase is plainly void as no perpetual lease is valid and the Commission did not have authority to purchase without the approval of the Governor in Council and it had no such approval. It was argued on the authority of *Commercial Cable Company v. Government of Newfoundland*, [1916] 2 A.C. 610, that the renewal clause being void, the whole lease was void, but in my opinion the renewal clause here did not deal with a condition precedent to the validity of the lease, and the lease may be viewed as a valid document eliminating the invalid clause. See *British American Fish Corporation, Limited v. The King* (1918), 18 Ex. C.R. 230, 44 D.L.R. 750. In that case a lease was granted for 21 years with an option to renew for a further period of 21 years. The option to renew was held to be beyond the power of the Minister under the Order in Council but the original term was held to be valid. See also *Hand v. Hall* (1877), 2 Ex. D. 355, where it was held that a leasing agreement might be treated as divisible and the invalid portion eliminated.

Apart from this aspect of the situation it seems to me that the defendant in this action is estopped from denying the validity of the lease in its entirety, subject to its right to attack any particular clause as void. Soon after the execution of the lease of 15th May 1933, the Commission vacated the premises in the King Edward Hotel, Toronto, previously used by the present plaintiff in the operation of Station CKGW. The King Edward Hotel Company sued the present plaintiff, which claimed over against the Canadian Radio Broadcasting Commission by third party notice. In the defence filed by the Commission it admitted (a) the lease of 15th May 1933; (b) that the Commission had entered into possession of all plant and equipment of Gooderham & Worts, Limited, including the broadcasting studio premises in the premises of the King Edward Hotel Company Limited, Toronto; and (c) that under the terms of the lease of 15th May 1933 it had covenanted with Gooderham & Worts, Limited, to indemnify it against all loss arising under the lease of 1st December 1927 between the King Edward Hotel Company Limited and Gooderham & Worts, Limited.

Masten J.A. in *Foster v. Reaume*, 60 O.L.R. 63, at p. 70, [1927] 1 D.L.R. 1024, said:

“Estoppel by matter of record or the principle of *res judicata* applies, as I understand it, to the particular *issue* which was determined by the earlier judgment, but not to collateral facts forming part of the evidence on which that issue was determined”. Applying this principle, it seems to me that this defendant cannot now be heard to say the lease is completely void, as the admission made in the King Edward Hotel litigation was not something collateral, but an admission which went to the very foundation of that action. If the Commission had then been able to repudiate the validity of the lease, the action against it must have failed. (Also see *Hoystead et al. v. Commissioner of Taxation*, [1926] A.C. 155).

It was argued that this defendant as an “emanation” of the Crown cannot be bound by the doctrine of *res judicata*. The authorities are conflicting as to whether the Crown can be so bound, but in my opinion it would be an extraordinary result if this defendant, with capacity to sue and be sued, and carrying on commercial activities, should not be bound as other corporations are by *res judicata*.

The lease being valid and the renewal clause invalid, what was the position of the parties subsequent to the expiration of the three-year term? No steps were taken by either party when the first term expired on 15th May 1936, except that the Commission continued to pay rent until it ceased to exist on 2nd November 1936, and the present defendant then continued payment of rent up to 15th May 1938. Such conduct following a lease for a term of years raises a presumption of a tenancy from year to year, and in my opinion that presumption has not been rebutted.

The objection was raised that the Commissioner had no capacity to enter into such a relationship without the approval of the Governor in Council. Actually when the first term expired on 15th May 1936, that restriction on the leasing power of the Commission had ceased to exist. By 1935 (Dom.), c. 65, s. 1(3), it was enacted that after 1st April 1936 the Act of 1932 should be read as if the amending legislation in the interval had never been enacted. The result is that from 1st April 1936 to 2nd November 1936 (when The Canadian Broadcasting Act 1936, 1 Ed. VIII, c. 24, came into force by proclamation), the original

Act of 1932 was in force. Under s. 9(b) of the Act of 1932 the Commission was not required to have approval by the Governor in Council or by Parliament to acquire private stations by lease. Consequently a course of action resulting in the creation of a tenancy from year to year was not beyond the power of the Commission. Under s. 25 of the 1936 Act already quoted the obligation of the Commission became the obligation of the present defendant.

Under date of 26th January 1938, the defendant gave notice to the plaintiff purporting to terminate the tenancy on 15th May 1938. This notice was defective, being less than the required six months. The attempted termination was also ineffective as of 15th May 1938, as the defendant had leased part of the demised premises to one Purdy to 30th April 1939. An assignment of this lease was tendered in the cancellation proceedings. It is difficult to see how the assignment of a lease running until 30th April 1939, can possibly be treated as delivery of the premises as of 15th May 1938. Apart from the part leased to Purdy, the defendant vacated possession as of 15th May 1938, and tendered the keys to the plaintiff, which refused to accept possession. Following the judgment of the Court of Appeal in *The King Edward Hotel Company v. Gooderham & Worts, Limited, and The Canadian Radio Broadcasting Commission (Third Party)*, unreported, I am of the opinion that the notice, together with abandonment of possession, did operate to terminate the tenancy on the first date on which it could be properly terminated, namely 15th May 1939. The plaintiff is consequently entitled to rent at \$12,000 per annum up to that date.

There remains for consideration the plaintiff's claim for damages for alleged breach of the covenant contained in clause 4 of the lease:—"AND the Lessee covenants with the Lessor to keep the whole of the demised premises modern and up-to-date and in good repair and operating condition."

It was argued on behalf of the defendant that the words "demised premises" do not include anything not at Bowmanville and that consequently the equipment at the studio in the King Edward Hotel was not included in the demise. Apart from the lands, what was demised was "all plant and equipment owned by the Lessor and used by it in connection with the operation of Radio Broadcasting Station CKGW." The equipment at the

King Edward was owned by the lessor and certainly was used in connection with the operation of the station, unless the words "station" and "operation" are cut down to an unreasonably narrow meaning as dealing only with the actual mechanical operation of the transmitter at Bowmanville. The word "station" as used in the description of the demised premises means, in my opinion, considerably more than a building and certain plant situated at Bowmanville. The parties to the lease evidently considered the King Edward equipment part of the demise, as much of it was not returned to the defendant until after 15th May 1938. The assumption of the King Edward studio lease also is an indication that the equipment was in the demise.

The words "good repair and operating condition" do not present any serious difficulty. Those words do not seem to carry any further implication than the words "good tenantable repair", dealt with in *Proudfoot v. Hart* (1890), 25 Q.B.D. 42, the head-note of which says that under such a covenant, "the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it." As applied to the demised premises in the case at bar, the words seem merely to imply an obligation to repair what was demised, but not to do anything further than to keep the plant operating in the same manner as when taken over.

The words "keep . . . modern and up-to-date", however, express something more than the ordinary duty to repair. The plaintiff in effect says that the defendant must keep on that site a broadcasting station of the same power, completely abreast with the broadcasting art, even if it entails discarding all the old plant and buying additional land (if necessary) to erect the latest type of antennae. That would be such an extraordinary burden to place upon the lessee that nothing less than the most unequivocal language should do so. It does seem to me, however, that the words carry an obligation to make all expenditures within reason to keep the existing plant abreast with the broadcasting art, but not to substitute a new plant for the old. For example, if a transmitter which cost some thousands of dollars could be modernized to a substantial degree by the purchase of some accessory costing a few hundred, the words under discussion would call upon the lessee to make such expenditure. As another

illustration it seems to me that the burden lay on the lessee to keep the stock of phonographic records modern and up-to-date with replacements as required and reasonable additions of new music.

The above interpretation of the covenant raises the question at once as to whether it was within the power of the Commission to give such a covenant. As suggested before, when the Governor in Council dealt only with the length of term and amount of annual rent it seems to follow that considerable discretion was impliedly given to the Commission in regard to other terms. In view of the nature of the demised premises, the covenant is not in my opinion beyond such implied powers.

The covenant may be supported on another ground. When the first three-year term expired on 15th May 1936, the Act of 1932 was in force, all the intervening legislation having been wiped out by the unusual repealing statute of 1935, 25-26 George V, c. 65 The Commission remained under the 1932 Act from 1st April 1936, to 2nd November of the same year, when The Canadian Broadcasting Act, 1936, came into force, repealing the Act of 1932, and creating the present defendant. During this period the Commission had power to lease on its own authority. It became a yearly tenant by payment of rent under the expired lease. Terms in the expired lease, within the power of the Commission at the execution of the lease, and not inconsistent with a tenancy from year to year, became binding on the lessee. It would seem to me, however, to be going too far to accept the position put forward on behalf of the plaintiff, that even if the lease was void when made it was "renovated" by payment of rent in the period between 1st April 1936, and 2nd November 1936, when the Commission could lease without getting authority under order in council.

The weight of the evidence was that the Commission and its successor, the defendant Corporation, did not live up to the covenant "to keep the whole of the demised premises modern and up-to-date".

It may be that a reference is necessary to ascertain accurately the damages suffered by the plaintiff, and the estimate herein-after made is put forward with great diffidence and in the hope that this litigation may be terminated.

On 16th May 1933, the Commission had power to lease on its own authority. The letter of that date, written on behalf

of the plaintiff and approved on behalf of the Commission, set forth the terms which the parties thought were the basis of agreement, subject to final settlement. At that time the bill which became law on 23rd May, was before Parliament, and naturally was known to the Commission. The plaintiff, although unable in law to say it had no knowledge of the law as it became on 23rd May, had as a matter of fact no actual knowledge of this change in the law until long afterwards. The Commission quite evidently did not think it had concluded a bargain on 16th May, when it had full power, because after 23rd May it submitted a report to Council through the appropriate Minister. Neither the letter of 16th May nor the draft lease then in the possession of the Commission was submitted to Council; the report only asked authority to lease for one term of five years at \$12,000 a year. Yet after the order in council authorized one term of three years at \$12,000 a year and dealt with nothing else, the Commission proceeded to settle and execute on 16th June the lease dated 15th May 1933. The Commission did not give Council the real basis of the pending negotiations, nor did it inform the plaintiff of the change in the law. Under such conditions the lease was executed on 16th June, containing the unusual provision for a perpetual lease or purchase by the Commission.

In 1937 the plaintiff intimated to the present defendant that it would be glad to take back the station if granted a licence with increased broadcasting power, and was referred to the appropriate department of government which dealt with licences. The plaintiff was unsuccessful in its application.

By the end of 1937 the defendant had built a new station at Hornby to replace the one at Bowmanville, and in January 1938 it attempted to terminate the lease with less than four months' notice. In the meantime the goodwill attached to the station identification letters CKGW had disappeared as the Commission discontinued their use shortly after taking over, and the present defendant, the Corporation, transferred the "station" to Hornby.

The defendant now pleads that the plaintiff is entitled to nothing on the ground that the lease was void. The defendant also pleads that "it is an emanation of the Crown and as such is the Crown . . . and that it may be proceeded against only by way of Petition of Right." That question is not before me, as in proceedings in this action ([1939] O.W.N. 507, [1939] 4 D.L.R.

241) the Court of Appeal has decided that the defendant may be sued in this Court.

Great increase of government control over business is a characteristic of the present day, and should carry with it a duty to see that the drastic powers vested in departments of government are exercised with moderation and consideration for the rights of the subject. The plaintiff seems to have valid grounds of complaint in equity as to non-disclosure of vital facts during the formation of the bargain and as to the manner in which it was attempted to terminate the lease.

I assess the plaintiff's damages for breach of covenant at \$25,000, with the right to either party to have a reference if desired in the place of such assessment. Each party must elect before the issue of the formal judgment whether it desires such a reference or not. In the event of a reference being necessary the damages should be ascertained as of 15th May 1939.

The evidence in this action was concluded just prior to Christmas vacation and the argument took place about a month later. After counsel for the plaintiff had made his argument in reply, counsel for the defendant moved for leave to amend the statement of defence by setting up that the memorandum in writing consisting of the letter of 16th May 1933, marked "Agreed" by Commissioner Steel, was (a) not executed on behalf of either of the parties by any one authorized to sign on behalf of either of them and (b) was not binding on either party because not executed under seal as required by law.

Leave to amend is refused as it would be inequitable to grant such an amendment at this stage of the proceedings. I refer to the remarks of Cotton L.J. in *Edevain v. Cohen* (1889), 43 Ch. D. 187, at p. 190, and of Kekewich J. in *James v. Smith*, [1891] 1 Ch. 384, at p. 389.

The plaintiff is entitled to its costs of action.

Judgment for plaintiff with costs.

Solicitors for the plaintiff: Long & Daly, Toronto.

Solicitors for the defendant: Jennings and Clute, Toronto.

[MACKAY J.]

The Tolton Manufacturing Co. Limited et al. v. The Advisory Committee for the Men's and Boys' Clothing Industry for the Province of Ontario.

Constitutional Law—Subject-matters of Legislation—Regulation of Wages and Hours in Particular Industry—The Industrial Standards Act, R.S.O. 1937, c. 191.

The Industrial Standards Act, R.S.O. 1937, c. 191, is a regulatory and not a penal statute, and is designed to provide for regulation of wages and hours, with special reference to conditions in particular areas or industries. It thus falls within the exercise of a power which was expressly held to be outside the Dominion's competence in *Attorney-General for British Columbia v. Attorney-General for Canada et al.*, [1937] A.C. 377, [1937] 1 D.L.R. 691, 67 C.C.C. 337, [1937] 1 W.W.R. 328. It follows that the Act is within the Province's powers over property and civil rights, and is *intra vires*.

Trades and Trade Unions—Regulation of Wages and Hours—Validity of Proceedings—Statutory Requirements and Powers—The Industrial Standards Act, R.S.O. 1937, c. 191, ss. 6-9, 14(1).

Where a conference has been requested, in accordance with s. 6 of The Industrial Standards Act, R.S.O. 1937, c. 191, and the conference is held and adopts a schedule, the only statutory prerequisite to the enactment of this schedule by Order-in-Council is that it shall be approved and recommended by the Minister. Where, therefore, this approval has been given, the Court cannot inquire into the sufficiency of the information upon which the Minister acted. Legislative power is delegated to the Lieutenant-Governor in Council, subject to this one prerequisite; if it is present, the Court has no power to interfere. *Murdock v. Kilgour* (1915), 33 O.L.R. 412, 22 D.L.R. 752; *The King v. Noxzema Chemical Company of Canada, Limited*, [1942] S.C.R. 178, [1942] 2 D.L.R. 51; *Local Government Board v. Arlidge*, [1915] A.C. 120, applied.

AN action by several manufacturers of men's and boys' clothing, for declarations (1) that The Industrial Standards Act, R.S.O. 1937, c. 191, was *ultra vires*, and (2) that a schedule adopted under the Act for the plaintiffs' industry was invalid because of non-observance of the statutory requirements in its adoption.

23rd to 27th March, 30th March to 2nd April, 28th to 30th April 1942. The action was tried by MACKAY J. without a jury at Toronto.

A. G. Slaght, K.C., and J. C. M. German, K.C., for the plaintiffs.

J. L. Cohen, K.C., for the defendant Advisory Committee.

C. R. Magone, K.C., for the Attorney-General of Ontario.

5th September 1942. MACKAY J.:— The plaintiffs carry on their respective businesses as manufacturers of men's and boys' clothing in the Province of Ontario. In this action they chal-

lenge the validity of The Industrial Standards Act, R.S.O. 1937, c. 191, and seek a declaration that the said Act is *ultra vires* and not within the enacting powers of the Legislature of Ontario, and that a schedule established pursuant to the said Act for the men's and boys' clothing industry and approved by the Lieutenant-Governor in Council on or about 1st April 1939, which establishes maximum hours and minimum wages in the industry, was not created pursuant to the requirements of the statute, and that the opinion of the Minister of Labour was illegally and improperly procured to induce him to recommend such schedule for approval by the Lieutenant-Governor in Council.

This action was commenced by a writ issued on 6th June 1940, and proceeded to trial before Roach J., who dismissed the action with costs. His judgment is reported in [1940] O.R. 301, [1940] 3 D.L.R. 383, 74 C.C.C. 252. The plaintiffs other than The Tolton Manufacturing Co. Limited appealed to the Court of Appeal. Before the hearing of that appeal The Tolton Manufacturing Co. Limited withdrew from the case and filed a notice of discontinuance, wholly discontinuing the appeal so far as that plaintiff was concerned. The appeal proceeded on behalf of the other plaintiffs, and was allowed on 14th March 1941. The judgment is reported in [1941] O.R. 79, [1941] 2 D.L.R. 541.

[His Lordship here summarized the terms of the formal order of the Court of Appeal, which provided for amendment of pleadings and reserved the costs of the first trial and of the appeal to be disposed of after the second trial, and proceeded:]

Amendments were duly made and issue was joined.

At the previous trial the Attorney-General, who had received notice with reference to the attack upon the statute, appeared and participated, being represented by Mr. C. R. Magone, K.C. Similarly on the appeal the Attorney-General appeared and participated in the argument, being represented by Mr. Magone and Mr. J. C. Adams, K.C., also of the Department of the Attorney-General.

On 23rd March 1942, at the commencement of the second trial, applications were made by the defendant and the Attorney-General with respect to parties, and finally, after discussion, by consent of all parties, at the instance of the Attorney-General and with the acquiescence of the plaintiffs, an order was made by the Court adding the Attorney-General as a party defendant to the action, but reserving to Mr. Magone, acting for the Attor-

ney-General, all just exceptions and rights which he would have had if he had not consented to add the Attorney-General as a defendant. As a term of so adding the Attorney-General without pleadings, discovery or production, it was stipulated by counsel for the plaintiffs that, if he was added, the trial should proceed forthwith, and not be adjourned in order that pleadings and other steps should be filed and taken, which term was assented to by all parties.

An application was made by the defendant for particulars of para. 4 of the amended statement of claim, and such particulars were filed and delivered during the course of the trial.

In the original action five individual members of the Advisory Committee were named as parties, in addition to the Committee itself. On motion made on behalf of the Advisory Committee and these five individual defendants by Mr. Cohen, an order was made by the Master, striking out the five individual defendants and continuing the action against the Advisory Committee alone.

The Industrial Standards Act, R.S.O. 1937, c. 191, as amended by 1939, c. 21, is attacked and alleged to be *ultra vires* of the Provincial Legislature, and the plaintiffs further allege that all preliminary steps detailed in the Act are essential and imperative, and must be taken before any schedule can be made effective.

[His Lordship here set out the pleadings as amended, quoted ss. 2, 3, 4, 5, 6, 7, 8, 9, 11, 13 and 14(1) of the Act, and proceeded:]

At the opening of the trial Mr. Magone launched a motion to the effect that the action was misconceived, on the ground that it was brought against the Advisory Committee, which is not a corporation, and therefore not a legal entity.

I am respectfully of opinion that s. 14(1)* of the Act is sufficiently wide to permit action to be brought against the Advisory Committee. *Shannon et al. v. Lower Mainland Dairy Products Board*, [1938] A.C. 708, [1938] 4 D.L.R. 81, [1938]

*"14(1) For every zone or group of zones to which any schedule applies the Minister may establish an advisory committee of not more than five members, one of whom shall be designated as chairman, and such committee may hear complaints of employers and employees to whom such schedule applies and may generally assist in carrying out the provisions of this Act and the regulations and shall have jurisdiction and authority to do anything which it is authorized to do by the provisions of such schedule and for the purpose of collecting any money which it is authorized to collect or paying any money which it is authorized to pay shall be deemed a corporation."

2 W.W.R. 604, and *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, Limited*, [1933] A.C. 168, [1933] 1 D.L.R. 82, [1932] 3 W.W.R. 639. Moreover, no objection was taken at the trial before Mr. Justice Roach or before the Court of Appeal. I am of opinion that if the Court of Appeal had not been convinced that it was proper to sue the Advisory Committee, they would have said so. At any rate the defendants consented to the retrial in this Court, and I am of opinion that they are now precluded from availing themselves of this defence because the position which they took induced the Court of Appeal, instead of rendering a decision further on the merits, to give the plaintiffs the right to proceed against the Advisory Committee, and to have the new issues, based on the amendments, tried.

The proper procedure in determining whether or not an Act, when fairly considered, falls within s. 91 or within s. 92 of The British North America Act, 1867, is, first, to examine the language employed in the Act challenged, and secondly, and in difficult cases, it may be necessary to go further and examine the effect of the legislation and "For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be." Lord Maugham L.C. in *Attorney-General for Alberta v. Attorney-General for Canada et al.*, [1939] A.C. 117 at 130, [1938] 4 D.L.R. 433, [1938] 3 W.W.R. 377 citing *Union Colliery Company of British Columbia, Limited v. Bryden*, [1899] A.C. 580.

The present canon of construction with respect to all statutes is to ascertain as best one can from the statute under review its objective and intention and to interpret and apply the language in the light of that objective. If the objective which emerges from an examination of the statute is that people are to be regulated, it is necessary to apply and interpret the language, giving to words their natural meaning, in order that such regulatory objective can be fulfilled. If a statute taken as a whole is a regulatory and not a penal statute, it should be construed in the light of that objective.

The Industrial Standards Act is a minimum wage and maximum hour Act. The procedure outlined in the Act is to provide for enactment of such provisions—minimum wages and maxi-

mun hours—with particular reference to particular conditions in particular areas or industries.

I am respectfully of opinion that the imposition of an assessment of one-half of one per cent., for an administrative purpose, is not a tax but a payment for services rendered in attaining the regulatory objective of the Act and the schedule. See *Shannon et al. v. Lower Mainland Dairy Products Board*, *supra*.

It is contended by the plaintiffs that The Industrial Standards Act is an invasion of the rights of the Dominion with respect to criminal law. I am of opinion that it matters not that legislation may affect the criminal law. It may be a valid exercise of the Provincial powers with respect to property and civil rights, even though it does affect the criminal law, so long as it is not legislation in relation to the criminal law. Moreover, counsel for the plaintiffs says at any rate that, if the field of legislation were clear, either legislature might enact this statute; but that the Dominion Parliament having occupied the field, by enacting The Combines Investigation Act, R.S.C. 1927, c. 26, the Provincial Legislature is therefore excluded.

The Combines Investigation Act deals with commodities; The Industrial Standards Act deals with hours of labour and rates of pay. There is no attempt in The Industrial Standards Act to deal with a commodity as such.

It was decided in *Re Rex v. Pulak*, 72 C.C.C. 222, [1939] 2 W.W.R. 219, that The Industrial Standards Act, 1937 (Sask.), c. 90, which deals exclusively with conditions of labour, does not conflict with The Combines Investigation Act, R.S.C. 1927, c. 26, as amended, and s. 498 of The Criminal Code which relate to arrangements, etc., regarding articles or commodities which may be the subject of trade; and hence is not *ultra vires*.

In 1937 there were submitted to the Supreme Court of Canada several references in connection with certain legislation enacted by the Parliament of Canada, namely, The Minimum Wage Act, The Natural Products Marketing Act and several others.

In *Attorney-General for Canada v. Attorney-General for Ontario et al.*, [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] 1 W.W.R. 299, there is a reference to the Labour Conventions Case which had to do with these Acts of the Dominion Parliament dealing with the Weekly Rests in Industrial Undertakings Act, the Minimum Wage Act and the Limitation of Hours of Work

Act. It is clear even from the titles of these Acts what the Dominion Parliament was attempting to do. It was attempting to deal with minimum wages in industry, and with limitation of hours of work in industry. The Privy Council affirmed the Supreme Court of Canada in determining that the legislation was *ultra vires* of the Parliament of Canada. It is clear, therefore, that if the Parliament of Canada has no power to pass this legislation it must be within the power and compass of the Provincial Legislature. In other words, it was an invasion of Provincial rights by the Dominion to deal with hours of labour or rates of pay.

Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 377, [1937] 1 D.L.R. 691, 67 C.C.C. 337, [1937] 1 W.W.R. 328, was also a reference by the Governor in Council to the Supreme Court of Canada in connection with the Natural Products Marketing Act which was a statute which dealt with the orderly marketing of products. If, indeed, it could be held that The Industrial Standards Act deals with a product—a pair of trousers—I am yet of opinion that the judgment in the Natural Products Marketing Act case makes it clear that the Dominion has not power to pass such a statute. The Natural Products Marketing Act, an Act that had to do with the holding back of products from the market, is a valid exercise of Provincial powers. The judgment of the Privy Council adopts the judgment of Duff, C.J.C., as reported in [1936] S.C.R. 398, [1936] 3 D.L.R. 622, 66 C.C.C. 180. His Lordship, summing up at page 426 (S.C.R.) said:

“To summarize: in effect, this statute attempts and, indeed, professes, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.

“Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable ‘in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provin-

cial legislatures' to quote from the judgment of the Judicial Committee in the *Board of Commerce* case [*Re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, 60 D.L.R. 513, [1922] 1 W.W.R. 20].

"The legislation, for the reasons given, is not valid as an exercise of the general authority of the Parliament of Canada under the introductory words of section 91 to make laws 'for the peace, order and good government of Canada'."

The Natural Products Marketing Act which was under discussion in the above case, is found in the 1934 Dominion Statutes, chapter 57. The powers of the Board were enumerated in section 4, clauses (a) to (i). The first clause empowered the Board

"to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class."

Here is a power that, by the judgment of the Privy Council, is determined to be a Provincial power if exercised within the Province. I am of opinion that in no way can The Industrial Standards Act be considered to be as comprehensive as the words above quoted of The Natural Products Marketing Act, and it follows as a matter of course that to the extent that the Dominion is forbidden to regulate within the Province, the Province itself has the right under its legislative powers over property and civil rights within the Province.

I am respectfully of opinion that The Industrial Standards Act is within the competence of the Provincial Legislature under s. 92 of The British North America Act, and that the statute is clearly regulatory in essence and in objective, and not penal. It aims to establish a floor for wages, a ceiling for hours, and practical machinery for supervision of the same. In other words, the pith and substance of the Act is to regulate particular industries entirely within the Province, and therefore it is *intra vires* of the Provincial Legislature.

Counsel for the plaintiffs further contend that there was no proper compliance with the statutory requirements for or pre-

requisites to the creation of a schedule. The statutory provisions or prerequisites to a schedule are as follows:

- (1) Designation of zone and industry;
- (2) Petition for a conference;
- (3) Designation by the Industry and Labour Board;
- (4) Authority to an officer to convene a conference;
- (5) Submission of a schedule;
- (6) Approval of the schedule by the Industry and Labour Board as to assessments and generally by the Minister of Labour;
- (7) Recommendation of the schedule by the Minister of Labour;
- (8) An order-in-council;
- (9) Gazetting.

Of these nine prerequisites, three are alleged by the plaintiffs not to have been properly or legally observed, namely (2) petition for a conference; (4) authority to an officer to convene a conference; and (5) submission of a schedule. It should be noted that the question of the method of convening or of conducting a conference is in no way prescribed or defined by the statute. This uncharted area is, I am of opinion, a matter of and for administrative discretion, and necessarily so because no single rule or provision could be devised to meet all cases, each industry and each zone having its own peculiarities or problems.

I am further of opinion that the Court will not interfere in matters of administrative discretion, because it has neither the equipment nor the information available to an administrative agency.

The petition is as follows:

"To

"Hon. N. O. Hipel,

"Minister of Labour,

"BUILDINGS.

.

"We, the undersigned representatives of *employees*, in the MEN'S & BOYS' CLOTHING INDUSTRY, as defined for the Province of Ontario, hereby request you to convene a conference of the employers and employees in such industry within the Province of Ontario zone as designated by you for the purpose of

investigating and considering the conditions of labour and the practices prevailing in such industry and for negotiating a schedule of wages and hours and days of labour pursuant to the Industrial Standards Act.

"DATED AT TORONTO, this 19th, day of November, 1938.

(Sgd.) "Sol Spivak

(Sgd.) "L. Frechtel, sec.-Treas.

"Toronto Joint Board Amalgamated Clothing Workers of A."

S. 6 of the Act is as follows:

"The Minister may, upon the petition of representatives of employers or employees in any industry within a designated zone or zones, authorize an officer to convene a conference of the employers and employees in such industry for the purpose of investigating and considering the conditions of labour and the practices prevailing in such industry and for negotiating with respect to any of the matters enumerated in section 7."

Counsel for the plaintiffs urged with zeal and enterprise that inasmuch as the petition did not make special reference to a proposed assessment, it is ineffective and of no virtue whatsoever; moreover that the men's and boys' clothing industry as a whole was not properly advised of this conference, and that Sol Spivak and L. Frechtel, officials of the Toronto Joint Board Amalgamated Clothing Workers of America were not, by virtue of the statute, authorized to sign such a petition.

I am of opinion that the petition for such a conference did not have to make special reference to a proposed assessment because the term used by the statute covering all items in s. 7 and adopted in the petition is "schedule of wages and hours and days of labour" pursuant to The Industrial Standards Act. Exhibits 40 and 44 set forth advertisements published in The Globe and Mail, a daily newspaper published in the city of Toronto, Canada, and The Toronto Star, also a daily newspaper published in the city of Toronto, Canada, on 6th January 1939. The form of advertisement in these newspapers is ample and complete and fully complies with everything provided in or contemplated by the statute.

Supplementary to such advertisements, notices, Exhibits 8 and 9, directing attention to the advertisement in The Globe and Mail and The Toronto Star, were posted to a large rep-

resentation of the industry, enumerated on a list kept in the office of the Department of Labour, which list appears as Ex. 34 in this action.

Mr. Slaght argues with vigour that every member of the industry must be advised, failing which there can be no conference within the contemplation of the statute. In support thereof he cites many cases dealing with meetings of shareholders. I am respectfully of opinion that a conference as contemplated by The Industrial Standards Act and a shareholders' meeting as provided by The Companies Act R.S.O. 1937, c. 251, are not in any way analogous. A conference is neither a legislative nor a delegated body. It is consultative only. A shareholders' meeting is specifically regulated by statute. Nothing is left to "administrative discretion". The opening words of s. 6 of the Act are as follows [see *supra*].

The Toronto Joint Amalgamated Clothing Workers of America have a membership of approximately three thousand employees in the men's and boys' clothing industry. Spivak and Frechtel are officials of this organization, and moreover they were authorized to sign such a petition by minutes of their association filed in this action as Ex. 46.

I am respectfully of opinion that the above contentions of counsel for the plaintiffs should not prevail.

I am further of opinion that the authorization by the Minister to Mr. Louis Fine, an Industrial Standards Officer, to convene a conference (Ex. 30) is right and proper. There is no form fixed or indicated in the statute as to how this authority is to be conferred.

Ex. 36 is the schedule submitted by the conference to the Minister. Likewise there is no form fixed or indicated in the statute, and Ex. 36 sets forth the facts clearly and specifically.

Inasmuch as special emphasis was placed upon the above submissions, they have been dealt with specifically. Speaking generally, it is clear that there is no legislative power delegated to a conference, there is no legislative power delegated to an officer of the Department of Labour, there is no legislative power delegated to the Minister of Labour, but there is legislative power delegated to the Lieutenant-Governor in Council. Up to the point where the Crown by an act of its Ministers, who are responsible to the Legislature, gave effect to a schedule, the plaintiffs might have taken proceedings by way of prohibi-

tion against the conference or the Minister, prohibiting the conference, if improperly constituted, from proceeding with its duties or prohibiting the Minister from approving a schedule which was improperly brought to him; and even after approval by the Minister the plaintiffs might have taken proceedings by way of *certiorari* to have produced before the Court the schedule which the Minister had approved, for making more certain—a loose translation of the word “*certiorari*”—that everything had been done which ought to have been done under the statute. But I am of opinion that the Crown, the only legislative force, having done what it had a right to do, the plaintiffs cannot now come before the Court and complain that the conference was not properly constituted.

It is clear from s. 8 of The Industrial Standards Act that the only prerequisite to the exercise by the Lieutenant-Governor in Council of his power is a recommendation from his Minister. There is no condition attaching to the passing of the Order except that recommendation, and I am of opinion that the exercise of that power is the same as the exercise of a legislative power.

Counsel for the plaintiffs do not say that the Lieutenant-Governor in Council could not enact everything that is in this schedule, apart from their argument as to constitutional validity. They do not say that The Industrial Standards Act gives the Lieutenant-Governor authority to do A, B, C and D only, while he has done not only A, B, C and D but also E and F, and that therefore the power which he exercised is invalidly exercised under the statute and is bad. On the other hand they say that he has acted in a manner in which he should not act, namely, on improper information. I am of opinion that there is no remedy in the Court for a situation in which the Lieutenant-Governor has acted on the only prerequisite which he is required to have before passing the Order-in-Council; see *Wilson et al. v. Esquimalt and Nanaimo Railway Company*, [1922] 1 A.C. 202, 61 D.L.R. 1, 28 C.R.C. 296, [1921] 3 W.W.R. 817. The case of *Murdock v. Kilgour* (1915), 33 O.L.R. 412, 22 D.L.R. 752, a judgment of the Court of Appeal for Ontario, arose out of an action brought against certain officials who were required to do certain things before submitting to the Secretary of State for Canada the result of a poll to bring into force the Scott Act (The Canada Temperance Act). If someone contravened the sections of the

statute regarding the importation of liquor or the purchase of liquor, that person was subject to fine and imprisonment. In so far as the nature of the statute is concerned, it is much the same as The Industrial Standards Act. In the judgment of Meredith C.J.O., at p. 420, this statement is made:

"It would be highly inconvenient if the powers of a Provincial Court could at any time be invoked to stay, or to set aside, any of the proceedings leading up to the issue of the proclamation bringing the Act into force, or to set them aside. If that were permissible, those opposed to the bringing of the Act into force might be able to prevent the vote from being taken at the appointed time, or to delay the proceedings for bringing it into force until the end of the litigation they had begun, which might not arrive until the case had reached, and had been decided by, the Privy Council."

Then there are more pertinent remarks in the judgment of Hodgins J.A., beginning on p. 421, in which he agrees with the other members of the Court in allowing the appeal, and has this to say:

"The provisions of Parts I and II of the Canada Temperance Act, R.S.C. 1906, ch. 152, seem to give to the electors qualified to vote for members of the House of Commons the initiative in promoting local prohibition in the county or city to which they belong. In the Governor in Council is vested the right to accede to the request or petition, provided a majority of those electors vote in favour of it. The sections relating to the commencement of these proceedings show that it is the Governor in Council who must be satisfied that the signatures to the petition are genuine and sufficient; and thereupon the Governor in Council may issue his proclamation, which, in addition to the usual provisions, can include, 'such further particulars, with respect to the taking and summing up of the votes of the electors, as the Governor in Council sees fit to insert therein.' "

At the bottom of p. 423:

"If Part II is finally proclaimed, then the consequences provided in sec. 110 must necessarily follow. In the event of an adverse vote, as in the present case, where there would be, in consequence, no proclamation, sec. 108 enacts that no similar petition shall be put to the vote within three years. But there is nothing to prevent such a petition from being prepared, signed, and presented. And, if satisfied that what had taken place was

not saved from invalidity by sec. 105, the discretion to act or not to act seems to me to have been left to the Governor in Council. If not, who can say whether the petition is to be acted on or not? This is a situation which arises after a scrutiny by the County Court Judge, and therefore he cannot intervene. It only confronts the executive, who must therefore decide, as it appears to me. It is a small matter to leave to the discretion of the Governor in Council, compared to the judicial duties devolving upon that body under the British North America Act in relation to education, and under the Dominion Railway Act.

"I am, therefore, more inclined to the view that the tribunal referred to in sec. 105 is the Governor in Council, owing partly to the narrow limits of the County Court Judge's powers, but particularly because there are larger duties imposed by the Act, and involved in the exercise of the rights it confers, than are comprehended in the scrutiny sections.

"If I am right, then I do not know of any power in the Courts of this Province to inquire into the exercise of this discretion, nor to entertain an action against the Governor in Council. The thing is unheard of; and, if it cannot be done directly, it hardly needs to be stated that it cannot be done indirectly.

"The Secretary of State, to whom the return is to be made, cannot act upon it; that must be done by the Governor in Council."

If I am right in the opinion that the formation of a schedule of wages, hours and days of labour, under s. 8 of The Industrial Standards Act, is, by virtue of the statute, purely an administrative function of the Minister of Labour, then I am of opinion that it cannot be inquired into by the Courts. In a late case, *The King v. Noxzema Chemical Company of Canada, Limited*, [1942] S.C.R. 178, [1942] 2 D.L.R. 51, Davis J., at p. 52 (D.L.R.) said:—

"The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to

perform a duty of that sort which is often described as a quasi-judicial duty.

"My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new s. 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given."

In *Local Government Board v. Arlidge*, [1915] A.C. 120, at p. 133, Viscount Haldane, the then Lord Chancellor, in delivering the judgment of the House of Lords, said:

"The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff."

It is therefore clear that the Minister is entitled to rely on the information which he gets from his officials.

I am of opinion, therefore, that the statute, The Industrial Standards Act, is within the powers of the Province under The British North America Act. I am also of opinion that in the case at bar the Court has no power to interfere with the action of the Lieutenant-Governor in Council, and that the action of the Minister of Labour in this case is ministerial or administrative and, therefore, is not open to review in the Courts.

The action should be dismissed. There should be no costs of the trial before Mr. Justice Roach, or of the appeal. The Advisory Committee and the Attorney-General are entitled to their other costs of the action.

Action dismissed.

Solicitors for the plaintiff: German & Howard, Toronto.

Solicitor for the defendant Advisory Committee: J. L. Cohen, Toronto.

[HOPE J.]

J. R. Mooney & Company v. Pearl Assurance Company Limited.*Insurance—Fidelity Bond—Construction—Exclusions from Coverage—“Dishonest Act”—“Trading Losses”.*

A “brokers’ blanket bond” insured the plaintiff against loss sustained, *inter alia*, “through any dishonest act of any of the [plaintiff’s] employees”, but expressly excluded, *inter alia*, “any loss directly or indirectly from trading, actual or fictitious”. The plaintiff was a firm of stock-brokers. *Held*, on a proper construction of the bond, the exclusion (which should be construed strictly against an undue narrowing of the coverage) should be read as limited to trading losses which were not caused by the dishonest act of an employee. The losses sustained in this case, which had resulted from manipulation of the customers’ ledger accounts and misappropriation of funds, should be held to be within the coverage of the bond, although they were “trading losses”, in the sense that the defaulting employee could never have committed defalcations of this kind and in this manner except for the nature of his employer’s business. *Paddleford et al. v. Fidelity & Casualty Co. of New York* (1938), 100 Fed., 2nd series, 606, agreed with.

The original bond, issued in 1934, insured against losses sustained after its date “and while this bond is in force”, and discovered “prior to the expiration of twelve months after the termination of this bond as provided in Condition 11”. Condition 11 provided for termination by notice in writing served by either party. This bond was continued by the payment of annual premiums in 1935 and 1936. In 1937 a new bond was substituted, in a different form, and it was found as a fact that the new bond was accepted by the insured on the understanding that it did not detract from or take away any of the protection formerly accorded by the first bond. When the substitution was made, the insurer’s copy of the first bond, and other records, were marked to indicate that it had expired or been cancelled, but no notice was given to the insured, as provided for in Condition 11. The new bond covered losses discovered within twelve months after termination of the bond as an entirety, as provided in Condition 11, “or in any other manner”. Losses were discovered in 1937, after the date of the second bond. *Held*, since the insurer must abide by the wording of its own bond, the first bond should be held to be a continuing bond until notice in writing was given for its termination. The insured was therefore entitled to rely upon it, not only for losses sustained before the date of the second bond, but also for those sustained after that date. Had the first bond been worded as was the second, it might well have been considered that it had been terminated by the substitution, but it was not so worded, and the only provision for termination was that calling for notice in writing.

Insurance—Claims under Policies—Notice and Proofs of Loss—Sufficiency—Duties of Insured and Insurer.

It is well established law that the particulars required in a proof of loss necessarily vary according to the nature of the insurance, and that such details must be furnished as are reasonably practicable. *Mason v. Harvey* (1853), 8 Ex. 819 at 820, 155 E.R. 1585, applied. Whether or not the details given are sufficient is a question of degree, depending upon the materials available and the time within which they must be furnished; the insured has not adequately performed his duty unless he has furnished the best particulars available in the circumstances. *Hiddle et al. v. National Fire and Marine Insurance Company of New Zealand*, [1896] A.C. 372 at 375, applied. Insurers must not act capriciously in this connection, but must be satisfied with such proofs as would satisfy reasonable men. *Braunstein v. Accidental*

Death Insurance Company (1861), 1 B. & S. 782, 121 E.R. 904, applied. *Globe Savings and Loan Company v. Employers' Liability Assurance Corporation* (1901), 13 Man. R. 531, quoted and applied.

AN action for \$21,724.68, being the amount of the defalcations of one Carlaw, an employee of the plaintiff. The action was based upon two policies of fidelity insurance issued by the defendant in favour of the plaintiff. The facts are fully stated in the judgment.

13th-17th April and 1st-4th June 1942. The action was tried by HOPE J. without a jury at Toronto.

Hon. J. Earl Lawson, K.C., and *Evan Gray, K.C.*, for the plaintiff.

T. N. Phelan, K.C., and *B. O'Brien*, for the defendant.

2nd September 1942. HOPE J.:—The plaintiff is a partnership in the city of Toronto, carrying on a brokerage business as a member of the Toronto Stock Exchange, and the defendant is an insurance company licensed to do business in the Province of Ontario, and having its chief office for Canada at the City of Toronto.

The plaintiff's action is for the recovery of an amount claimed by the plaintiff from the defendant under two policies of fidelity insurance, commonly known as "brokers' blanket bonds", as the loss sustained by the plaintiff by reason of certain defalcations by one of the employees of the plaintiff.

The first bond, *viz.*, bond No. 1540052, was originally issued on 7th July 1934, and subsequent annual premiums thereon were paid in the years 1935 and 1936. This bond was issued following an application in writing signed by the plaintiff, dated 7th July 1934, on a form supplied by the defendant. The only terms of the application which are necessary to consider in this action are, firstly, that it is for a brokers' blanket bond "for a term of indefinite duration" beginning at noon on the 7th day of July 1934, and secondly, "The following information is given to the Surety by the Applicant for the purpose of enabling the Surety to decide with full knowledge of the facts whether or not to furnish the desired suretyship."

The following questions and answers, amongst others, then appear in the application:

"8. Approximate number of margin accounts carried? 400.

"9. (a) What employee or employees keep the marginal accounts records? T. C. Kerr.

“(b) How often and to what extent does any member verify sufficiency of margins? Weekly reports.

“10. (a) Who sends out the daily and monthly statements to customers? Watkins Noonan.

“(b) Under whose supervision? T. C. Kerr.

“(c) How and to what extent does supervisor verify actually sending out of statements? Checked with ledger by ledger-keeper.

“(d) Do those who send out these statements have anything to do with receiving or placing orders or keeping the marginal records? If so, give particulars. Orders from personal clients.

“11. (a) State how often an audit of the books and accounts is made by a member of the firm or private auditor. Twice yearly by exchange auditor.

“(b) Are the cash and securities actually counted and verified? Yes.

“(c) Are the ledger balances to the credit of customers verified? Clients requested to report to auditor.

“(d) State when the last complete audit was made by a public accountant. June 30, 1933.

“(e) By whom? N. B. McLeod, C.A.

“(g) How often in the future will such an audit be made, and will these include the branches, if any? Twice yearly.”

The first bond, which, according to the evidence of the defendant's manager was only the first or second bond of its nature written by the defendant, was stated by the defendant's manager, Mr. Butler, to be in the form approved by the Canadian Underwriters Association. The form itself was not, as is normally the case, in the main printed, but was, save for its heading, fully typewritten. By its terms, and in consideration of the premium paid by the plaintiff to the defendant for a period of the first year, and of subsequent annual premiums (to be computed on a defined basis), the defendant undertook and agreed to indemnify the plaintiff and hold the plaintiff harmless from and against any loss to an amount not exceeding \$25,000, sustained by the insured subsequent to noon of 7th July 1934, “and while this bond is in force” and discovered by the insured subsequent to noon of the 7th day of July 1934, and “prior to the expiration of twelve months after the termination of this bond as provided in Condition 11”,

“(a) Through theft, as defined by the Criminal Code of Canada, committed by any of the employees, and whether committed directly or by collusion with others;

“(b) Through robbery, burglary, hold-up or theft while the property is within any of the Insured’s offices covered hereunder . . . not including, however, the in transit risk;

“(c) Through robbery, hold-up or theft by any person whomsoever while the property is in transit . . .”

On 7th July 1935, there was substituted for clause (a) of the coverage aforesaid, by a rider attached to the policy, the following:

“(A) Through any dishonest act of any of the employees wherever committed, and whether committed directly or by collusion with others.”

The bond then contained certain conditions, stipulations and limitations which become pertinent to the consideration of this action by reason of the contentions set up by the defendant by way of defence, and also by reason of the plaintiff’s reply to such contentions of the defendant. These clauses are as follows:

“2. This bond does not cover—

“(a) Any loss directly or indirectly effected by means of forgery, unless the forgery be committed by, or with the collusion of, one or more of the employees.

“(d) Any loss through theft committed by any person to whom an employee shall have *otherwise than through dishonesty* delivered property or extended credit.

“(g) Any loss directly or indirectly from trading, actual or fictitious, whether in the name of the Insured or otherwise, and whether or not within the knowledge of the Insured, and notwithstanding any act or omission on the part of any employee in connection therewith, or with any account recording the same.

“(i) Any loss of property contained in customers’ safe deposit boxes unless such loss be sustained through any dishonest act of an identifiable employee under such circumstances as shall make the Insured legally liable therefor.”

It might be noted that although the dishonest act rider was not substituted for the theft clause (a) above referred to until 1935, the bond as originally issued in 1934 excluded certain losses notably in clauses 2(d) and 2(i) above quoted, provided, however, that such coverage was not excluded if the losses re-

ferred to were sustained through any dishonest act of an employee.

The further pertinent clauses of the first bond read as follows:

"4. The Insured shall give to the Underwriter written notice of any loss hereunder as soon as possible, and at all events not later than ten (10) days after the Insured shall learn of such loss, and within ninety (90) days after learning of such loss shall file with the Underwriter an itemized proof of claim duly sworn to.

"6. No action or proceeding shall be brought under this Bond in regard to any loss, unless begun within twelve months after the Insured shall learn of such loss, or, in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law."

"11. This bond shall be deemed cancelled at noon, standard time as aforesaid, upon the effective date specified in a written notice served by either party hereto upon the other, or sent by registered mail"

In April 1937, The Canadian Underwriters Association adopted a new form of brokers' blanket bond and according to Exhibit 87, being a letter from the Canadian Underwriters Association to all members, dated 14th April 1937, the defendant, as one of such members, was given a mandatory order to use the new form of brokers' blanket bond and was directed that "all business must be replaced [with the new form] not later than the next renewal date."

Some question might properly be raised as to the admissibility of this letter, but the facts of it were verified *viva voce* by Mr. Butler at the trial, when he stated that upon visiting the plaintiff with regard to the renewal of its bond, he explained to the plaintiff that the defendant could not renew the existing bond, and that a new bond would have to be issued for the reason that as a member of the Canadian Underwriters Association the defendant had to discontinue the old form of bond. Therefore, the second bond in question in this action, namely, bond No. 1599711, was issued in the new form, being almost entirely a printed form, with certain blanks therein filled in by typewriter.

This bond, while it varied in form, gave almost the identical coverage contained in the former bond, with some additions thereto. New types of coverage had not been sought by the

plaintiff, but when the necessity for the new form of bond was under discussion, additional coverages were suggested by the defendant and were considered by the plaintiff.

Considerable parol evidence was submitted and received subject to objection, as to discussions which occurred between Mr. J. R. Mooney and Mr. Butler and the defendant's agents during a period of some weeks, at the time of the issue of the second bond. The admission of such evidence was objected to by the defendant's counsel. But I believe the law as to the admissibility of parol evidence is quite clear, and such admissibility is governed by the usual rules, *viz.*, the terms of the policy cannot be varied or contradicted by parol evidence, but parol evidence is admissible to explain latent ambiguities, and generally to prove the surrounding circumstances in order to apply the contract to the facts which the parties had in mind, and about which they were negotiating: *Moss v. Norwich and London Accident Insurance Association* (1922), 10 Ll. L. Rep. 395.

This second bond must speak for itself, but I do find on the evidence that the second bond was accepted by the plaintiff on the understanding that it did not detract from or take away any of the protection formerly afforded to the plaintiff by the first bond. This finding of fact may be of some material importance later when I come to a discussion of the defences set up by the defendant.

The application for the second bond, in what is to all intents the precise form of the earlier application, was completed by the plaintiff, under date of 7th July, and the second bond, similarly dated, was issued. While both of these are dated 7th July, it was apparent from other evidence that neither was completed on that date, but that the negotiations in connection with the second bond continued over a considerable number of weeks during July, August and September of 1937.

It should be noted that by the second bond the defendant undertook and agreed to indemnify the plaintiff against any losses sustained by the plaintiff subsequent to noon of 7th July 1937, and while this second bond was in force, and discovered by the plaintiff subsequent to noon of the date of the bond and prior to the expiration of twelve months after the termination or cancellation of the bond as an entirety, as provided in the first paragraph of Condition 11 "or in any other manner". This last clause, namely, "or in any other manner", had not appeared

in the first bond, in which the provision for the termination or cancellation was limited to the provisions of Condition 11.

The material coverages in the second bond are set out in the following paragraphs:

“(A) Any loss through any dishonest, fraudulent or criminal act of any of the Employees, including loss of Property through any such act of any of the Employees, whether acting alone or in collusion with others and wherever any such act may be committed.

“(B) Any loss of Property through robbery, burglary, hold-up, theft or other fraudulent means, misplacement, mysterious unexplainable disappearance, abstraction or removal from the possession, custody or control of the Insured,” etc.

The second bond was also subject to the following material exclusions, conditions and stipulations:

“2. THIS BOND DOES NOT COVER:

“(a) Any loss directly or indirectly effected by means of forgery, except when covered under Insurance Clause (A) . . .

“(e) [As amended at the date of issue of the bond by rider (c) attached]—Any loss resulting directly or indirectly from trading, with or without the knowledge of the Insured, in the name of the Insured or otherwise, whether or not represented by any indebtedness or balance shown to be due the Insured on any customer’s account, actual or fictitious, and notwithstanding any act or omission on the part of any Employee in connection with any account relating to such trading, indebtedness, or balance”

“4. The Insured shall give to the Underwriter written notice of any loss hereunder as soon as possible after the Insured shall learn of such loss, and within ninety days after learning of such loss shall file with the Underwriter an itemized proof of claim verified by oath. The Underwriter shall have thirty (30) days after receipt of notice and proof of loss within which to investigate the claim, but where the loss is clear and undisputed, settlement shall be made within forty-eight hours; and this shall apply notwithstanding the loss is made up wholly or in part of securities of which duplicates may be obtained.”

“6. No action or proceeding shall be brought under this bond in regard to any loss, unless begun within fifteen months after the Insured shall learn of such loss, or, in case such limitation be void under the law of the place governing the construction

hereof, then within the shortest period of limitation permitted by such law.

"11. This bond shall be deemed terminated or cancelled as an entirety—(a) thirty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate or cancel this bond, or (b) immediately upon the receipt by the Underwriter of a written request from the Insured to terminate or cancel this bond".

According to the evidence of Mr. Butler, and as disclosed by the defendant's office copies of the first application and bond, and by its policy register, page 300, photostatic copy of which was filed as Exhibit No. 90, when the second bond was issued the office copy of the first bond, No. 1540052, was stamped with a large X over the first page thereof, indicating that this bond had expired or was cancelled, as Mr. Butler variously stated, and the policy register also had stamped with a rubber stamp on the line of the registration of this first bond the word "Expired". Mr. Butler, however, agreed that while the old bond was so disposed of, the liability thereunder continued, and furthermore, that the old bond was never cancelled as required by clause 11 thereof. No continuity certificate was issued for the old bond, as Mr. Butler explained that he thought the plaintiff's rights continued under it, and he admitted that had the defendant been asked therefor, the same would have been furnished.

Therefore I find that no notice of cancellation or termination of this bond in writing as required by Condition 11 thereof was ever given by the defendant to the plaintiff. Despite the treatment of the defendant's records with respect to this first bond as thus set out, Mr. Butler freely stated in his examination-in-chief that at the time of the discovery of the loss the two bonds were still active, in accordance with their respective terms.

Each of the bonds was written through Messrs. Watson & McVittie, agents, of Toronto. In cross-examination of Mr. J. R. Mooney of the plaintiff partnership, Mr. Phelan suggested that these agents were agents for the plaintiff. I can, however, find nothing in the evidence which would support such a finding. Mr. Butler admitted that Watson & McVittie were general agents for the defendant, but claimed that such general agency extended only to fire and casualty business, and did not extend to the fidelity insurance business, claiming that, while the agents were recording agents for the former business, they were not record-

ing agents for fidelity business. It was later admitted by him, however, that there were no recording agents in Canada for the latter type of business. It was later disclosed by Mr. Butler, on cross-examination, that although the general commission to an ordinary agent on fidelity business was fifteen per cent., the commission paid to these agents on the writing of the bonds in question, was twenty-five per cent., which, I understand, would be more in the nature of a general agent's commission. No member of the partnership agency was called as a witness at the trial.

I find as a fact, on the evidence, that Messrs. Watson & McVittie were, for the purposes of the matters under review, the duly authorized agents of the defendant.

It is claimed by the plaintiff, and I think I can accept on the evidence that it is conceded by the defendant, that during the years 1935, 1936 and 1937, one Carlaw, a Head Office employee of the plaintiff, whose fidelity was thus guaranteed by the bond, caused certain losses of property to the plaintiff by what are alleged to be dishonest acts, theft, forgery and other fraudulent and criminal acts. Carlaw had been in the employ of the plaintiff company since 1934, originally as margin clerk and ledgerkeeper for the accounts receivable, and during the periods covered by the bonds he had had in his charge the customers' ledger accounts.

The manipulations of entries in the ledgers carried on by this employee were many and varied, and despite the regular audits which were had, were well concealed from discovery.

The plaintiff's claim is that Carlaw, by reason of his dishonest entries and omissions in the accounts and records as shown and illustrated in the documents attached to the proof of loss, established false credits in various accounts and that, having done so, he then misappropriated or converted moneys and securities, the property of the plaintiff, to the use and benefit of himself and others, to the extent of some \$21,724.68.

For the purposes of my judgment, it is not necessary for me to go into detail as to the various manipulations by Carlaw. However, some of the methods employed by him were as follows:

1. By decreasing the correct debit balance in certain ledger accounts;

2. By increasing the correct credit balance by raising the price of securities sold;

3. By the entry of cheques as received in certain accounts when such cheques were not so received in fact.

4. By the entry of sales as having been made for certain accounts when such sales had not so been made in fact;

5. By selling securities which had not been, in fact, received by the plaintiffs.

6. By entering cheques received, as received, but for an increased amount.

As I understand the proof of loss submitted, no claim is made by the plaintiff in respect of losses occasioned to it by reason of a trading account operated by Carlaw in the name of his wife, and in her maiden name, Mitchell, prior to their marriage.

The first inkling of any dishonest or improper actions on the part of Carlaw came to the attention of the plaintiff on 17th November 1937. Immediately upon such discovery, and on the evening of that day, the plaintiff had Carlaw attend at its head office, when he admitted, to a certain degree, particulars of his wrong-doing. The plaintiff, on the same day, also notified Messrs. Watson & McVittie and Mr. Butler. These gentlemen attended at the office of the plaintiff on the evening of 17th November, while Carlaw was there, and were apprised of all information concerning the defalcations which was then within the knowledge of the plaintiff. The same evening a Mr. Fetterly, an investigator, was called in and retained by the defendant for inquiry into Carlaw's defalcations. Fetterly kept Carlaw in virtual custody at a down-town hotel throughout the night, and on the following day obtained from him a written statement of his defalcations. This statement was filed as Exhibit 81.

Having been discovered, it is evident that Carlaw attended repeatedly at the office of the plaintiff to give assistance in the investigation of his manipulations of the books, and the preparation of the proof of loss. He also attended at the request of the defendant at its office, and at the office of a firm of chartered accountants, who were employed by the defendant for the purpose of investigating the loss. Carlaw was also a witness at the trial, and throughout lent every possible assistance within his power to unravelling the ramifications of his wrong-doing.

On the evidence as submitted, and without going into particular items of the claim, for which there shall be a reference to the Master in order to determine the gross amount thereof, should this be necessary failing an agreement of the parties,

I have no difficulty in concluding that the plaintiff has, as required of it in a case of this kind, established a *prima facie* case for the recovery of its losses occasioned by the dishonest acts of the employee Carlaw, committed directly or by collusion with others within the coverage of the substituted clause (A) of the first bond, for such period as I will later discuss, and also for such losses as were partly occasioned by theft within the coverage of clause (B) of the first bond, and also further occasioned by dishonest, fraudulent and criminal acts of Carlaw acting alone and in collusion with others within the coverage of clause (A) of the second bond, within the period which I shall hereafter discuss, and also such losses as were occasioned by theft and other fraudulent means within the coverage of clause (B) of the second bond. This finding is subject, at all times, to the effect on the liability of the defendant of those stipulations, limitations and conditions hereinbefore quoted from each of the bonds, and which the defendant now claims preclude any recovery whatsoever by the plaintiff for any of the losses.

I will now consider these defences *seriatim*, and my consideration for the time being will be on the assumption that each bond is and was a separate contract.

The defendant first relies on the provision of clause 4 of each of the above bonds, namely, that provision which requires the insured to give to the insurer written notice of any loss under the bond as soon as possible, and at all events not later than ten days after the insured shall learn of such loss.

I find the facts with respect to the matter of notice, written or otherwise, to be as follows: On the evening of 17th November 1937, the defendant's manager, Mr. Butler, attended at the plaintiff's office and there learned of the losses variously estimated, but without full particularity. It is quite apparent that no written notice of loss, as such, was given to the defendant by the plaintiff. However, on 18th November, prior to the dismissal of Carlaw from the plaintiff's employ on that date, Carlaw, while therefore still an employee, gave to Fetterly, the investigator on behalf of the defendant company, a written statement of his defalcation as filed in Ex. 81.

On 18th November the then manager for Canada of the defendant company wrote to the plaintiff a letter, Ex. 68, as follows:

"Re: Claim—Bond No. 1599711.

"Defalcator—J. D. Carlaw.

"An alleged claim has been reported to this Company under the above head, re defalcation on the part of J. D. Carlaw.

"It has come to our attention, that at least some of this loss is due to Trading Losses, and if such is the case the bond carried does not cover same.

"It is always our wish to co-operate in a matter of this kind and to serve our clients, but you will quite appreciate that in order to do so, it is necessary for an understanding between ourselves and our assured, that any action taken in attempting to secure salvage or to handle the loss in any way by us, must be without prejudice as to the interests of this Company or our assured.

"This letter is merely for the purpose of putting the matter before you so that there will not be any misunderstanding later on, and in order that we may immediately get to work and see what headway can be made. We would therefore appreciate an answer immediately."

The plaintiff replied to this letter by letter, Ex. 69, dated 18th November 1937, in which the plaintiff referred to the second bond by number, the defalcator by name, and the investigation of the alleged defalcation, and again, in Ex. 70, the plaintiff replied to the defendant's letter of 18th November, although this reply is undated. Again in Ex. 70 reference is made to the alleged claim under the second bond.

I am therefore of the opinion that so far as the second bond is concerned, there can be no question whatsoever as to the actual written notice, and with respect to the first bond, as I will discuss presently, from the standpoint of estoppel or waiver, I am of the opinion that while there was no strict compliance with the terms of the first bond on the matter of written notice, yet the defendant, by its conduct, waived such requirement.

In Macgillivray on Insurance Law, 2nd ed., at p. 1168, the law with respect to waiver of notice is quite clearly put as follows:

"The condition as to notice may be waived by the conduct of the company. This may be done before or after there has been a breach of the condition: before, by conduct inducing the claimant to rely on informal notice or to delay giving formal

notice; after, by conduct inducing the claimant to incur further trouble or expense in the prosecution of his claim in the belief that the forfeiture on the ground of defective notice would not be enforced. *Burridge & Son v. F. H. Haines & Sons Lim.* (1918), 87 L.J.K.B. 641."

Macgillivray also states as follows:

"If before the time for giving notice has expired the insurers receive an informal or otherwise insufficient notice it is their duty, if the defect is apparent on the face of the notice, to inform the claimant and give him an opportunity of remedying the defect while there is yet time, and if they do not do so their silence will be taken as a waiver of the defect. *Welsh v. London Assurance Corporation* (1892), 151 Pa. 607. *A fortiori* there is a waiver if without requiring the defect to be remedied they act upon an informal notice, as where a condition required written notice and the insurers on receiving oral notice sent their medical officer to investigate the case. *Martin v. Equitable Accident Association* (1891), 61 Hun. (N.Y.) 467. . . .

"It has been held in America that if the insurers without taking objection to the notice furnish the claimant with blank forms and require him to fill them up and furnish evidence they waive the defence of defective notice. *Moore v. Wildey Casualty Company* (1900), 176 Mass. 418."

Where the notice of loss is required to be made in writing, stating the cause, nature and extent of the loss, strict performance of this condition will be deemed to have been waived by the guarantors where, upon information of the loss, they take steps to ascertain the facts fully: *Globe Savings and Loan Company v. Employers' Liability Assurance Corporation* (1901), 13 Man. R. 531.

From the evidence it is abundantly clear that Mr. Butler, the manager of the defendant company, had in his mind from the outset a possible claim under each of the two bonds, but despite this all correspondence—*viz.*, Exhibits 68, 69 and 70—which was carried on after the discovery of the loss and also for some time after the issue of the writ, he referred only to the second bond by number. At no time was the first bond referred to by number or otherwise. Mr. Butler accounted for this by explaining that in the light of their treatment of their office records with respect to the first bond, the liability was referred to in their office as under the second bond number only, and that

it was purely a clerical error in the first instance made by his stenographer in referring to the second bond only in the letter written by the defendant, Ex. 68. This error seems to have been carried along and the existence of the first bond was not brought to the attention of the plaintiff or its solicitor until after the issue of the writ. I accept this explanation of Mr. Butler that it was an inadvertence, otherwise I should be compelled to conclude that, it being present in his mind that the liability of the defendant might also be on the first bond, his failure to refer to the first bond or to send proof of loss forms as required by the statute in connection with the first bond had been motivated by the ulterior object of avoiding liability thereunder. After hearing his evidence I would not attribute such an unworthy and Machiavellian motive to him or to the defendant at the time, despite the fact that the defendant is now prepared to avail itself of this defence. Being cognizant of the contingent liability under the first bond, it was to be expected that the defendant would have directed attention to both bonds in its correspondence with the plaintiff, and it was not until in its letter dated 16th February 1939, Ex. 74, addressed to the plaintiff's solicitor, that the defendant referred even indirectly, as it did in this letter, to the existence of a bond other than the second bond. All earlier letters of the defendant to the plaintiff following the original discovery of the loss, had been captioned with a reference to bond No. 1599711, that is, the second bond. Strangely enough, the letter, Ex. 74, is captioned only: "Re J. R. Mooney & Company" and while it referred to "the bond", the defendant later in the letter used the phrase "their contracts with us" for the first time.

In the case at bar there is no suggestion that the correspondence in connection with the claims, to which I have referred, was carried on without prejudice as it was in the case of *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company* (1908), 17 O.L.R. 462, cited by the defendant's counsel. In this latter case, in which the Court could not find any reasonable evidence of waiver of the condition, Meredith J.A., at p. 482, said:

"The correspondence regarding the proofs began with a distinct statement by the appellants that it was without prejudice, and throughout, with the exception of one letter, this position was expressly declared and maintained."

In *Lownsborough v. Canadian National Railway Co.* (1930), 39 O.W.N. 271, referred to by the defendant's counsel, it is to be noted that the provision for the notice of loss in that case was one which was laid down by the Board of Railway Commissioners for Canada, and was therefore in a similar category to a statutory provision against which the Courts could not grant relief, but it might be noted that the decision in that case rested upon this ground. While he agreed with the facts as set out by Grant J.A., and concurred in the Court's judgment, Middleton J.A. clearly stated (at p. 274) that he "was unable to agree with the Chief Justice as to the construction of the bill of lading. . . . In any case the notice was accepted and acted on, and it is now too late to suggest that it was not sufficient."

Summarizing on this feature, I am of the opinion that it can well be held that aside from the notice in writing of the loss which was contained in Carlaw's statement to Fetterly, there was also written notice in the letter of 18th November from Mooney to the defendant concerning the loss under bond No. 2. In addition to this finding of fact, I must conclude that in the light of all the circumstances the defendant has, by its conduct, waived formal compliance with the condition of each bond requiring notice of loss in writing, and is estopped by such conduct from setting up such a defence.

A further defence raised by the defendant to the whole of the plaintiff's claim is the insufficiency of the proof of claim filed in respect of the claim under either or both of the bonds, and also that there was no proof of claim whatever filed with respect to the old bond. The requirements of each bond as to proof of claim are set out in clause 4 respectively, as previously quoted, and each bond contains the same provision.

No forms for proof of loss claims were furnished by the defendant to the plaintiff with respect to the first bond, in accordance with the statutory duty imposed upon the defendant.

Proof of loss claims were furnished by the defendant to the plaintiff by letter, Ex. 71, dated 24th November 1937, but referring to the second bond only.

From the evidence at the trial, it is abundantly apparent that the investigation necessary to be made by the plaintiff before completing the proof of loss as to the nature and extent of its losses, proceeded with all reasonable expedition consistent with the continuance of the plaintiff's normal brokerage business,

and the magnitude of the task of such investigation. It was explained that the labour involved in the investigation necessary for the preparation of the proof of loss involved the examination of more than one and a half million entries of transactions which had passed through the plaintiff's office during the period in question.

Mr. Mooney testified that during this period of investigation, the agents, Messrs. Watson & McVittie, communicated with him as to the progress of the preparation of the proofs of loss, and reminded him that the same must be filed within ninety days and that any action must be commenced within fifteen months after the discovery of the loss. While Mr. Butler denied responsibility for any such representations, neither Mr. Watson nor Mr. McVittie was called upon to testify, and I have no hesitancy in accepting Mr. Mooney's evidence on this point.

In submitting the proof of loss, the plaintiff did not use the actual blank forms sent to it by the defendant, but a careful comparison of the forms furnished by the defendant and the completed forms filed by the plaintiff discloses that in all essentials the forms are almost *verbatim*, except for the itemization of the claims. Owing to the complicated intricacies of Carlaw's dishonest manipulation of the records and the accounts, the plaintiff submitted what was to me a very much more comprehensive statement of the claim for loss, duly verified by affidavit, as required. This proof so submitted had attached to it photostatic copies of the various clients' or customers' ledger accounts in which entries found to have been dishonestly made by Carlaw were specifically "ringed" or identified, and also specimen copies of office records setting out a consolidation of the dishonest acts of Carlaw. While Mr. Patterson of the firm of chartered accountants employed by the defendant to verify the computation of the loss, testified as to the insufficiency of the data thus submitted by the plaintiff, Mr. Falconer, the plaintiff's accountant, found the proof of loss as submitted fully informative.

In this regard it might be noted that the blank forms for proof of loss furnished by the defendant to the plaintiff contained the following "Instructions for making proof":

"Statement of loss should be an itemized account showing names, dates, amounts and description of individual items of money, securities or property, misappropriated, stolen or embezzled, *as nearly as can be ascertained* . . . Attach to proof

all original vouchers, if possible, otherwise verified copies of same and any further evidence in explanation or support of the amount or amounts for which the claim is made." (The italics are mine).

The proof of loss so furnished by the plaintiff was delivered to the defendant on 16th February 1939, that is within the period of ninety days after originally learning of the loss. It was apparent on the evidence, that for some time after 17th November, the date of the original discovery of loss, new items of loss were becoming apparent, and two items were learned of even after the issue of the writ.

It is true that the proof of loss, Ex. 59, referred only to the second bond by number and not to the old bond, but as previously set out, this was due to a mutual mistake or misapprehension as to the policy involved, and this mistake was, I must find, due to the action of the defendant.

It is well established law that the particulars required in the proof of loss necessarily vary according to the nature of the insurance, and further that they must be furnished with such details as are reasonably practicable. *Mason v. Harvey* (1853), 8 Ex. 819, at 820, 155 E.R. 1585.

Whether the details given are sufficient or not is a question of degree, depending partly upon the materials available, and partly upon the time within which they have to be furnished. The assured has not performed his duty adequately unless he has furnished the best particulars which can be furnished in the circumstances. *Hiddle et al. v. National Fire and Marine Insurance Company of New Zealand*, [1896] A.C. 372 at 375.

In requiring proofs or in deciding as to their sufficiency the insurers must not act capriciously. They must be satisfied with such proofs as would satisfy reasonable men. *Braunstein v. Accidental Death Insurance Company* (1861), 1 B. & S. 782, 121 E.R. 904.

In *Globe Savings and Loan Company v. Employers' Liability Assurance Corporation* (1901), 13 Man. R. 531 (*supra*), Killam C.J. stated (at p. 544):

"The question of the fulfilment of the conditions as to proof of the claim is one of greater difficulty. . . . Now, the onus is certainly upon the Company [the plaintiff] to show performance of these conditions. But it must be borne in mind that the language is that of the Corporation [the defendant] par-

ticularly, and that, where the guarantor has taken up a hostile attitude, the onus is a very heavy one. The conditions should be construed as strictly as their language reasonably permits, and the Court must be very astute to draw inferences in favour of a party who has to prove the opinion of his opponent under such circumstances."

In the light of all of the circumstances of this case, I have no hesitancy in finding as a fact on the evidence that the proof of loss furnished by the plaintiff amply meets the demands of the condition contained in clause 4 of each of the bonds.

The defendant's contention is that, even if there be a finding against the defendant in the matter of notice of loss and proof of loss, the plaintiff is nevertheless disentitled to recover any of the losses covered by the first bond by virtue of the provision of clause 6 therein, which was hereinbefore quoted and which requires that any action brought thereunder in regard to any loss must be within twelve months after the insured shall learn of such loss.

The writ herein was issued on 16th February 1939. The endorsement thereon claims under the second bond only. The statement of claim was subsequently filed, and while it referred to the issue of the first bond as well as the second, the claim in the statement of claim was based on the second bond only.

After particulars had been given on the statement of claim, and the statement of defence had been filed, the plaintiff moved for leave to amend the statement of claim. This was permitted by order of the Master of the Court, with leave to the defendant to amend in turn the statement of defence as it might be advised. The statement of defence was not amended. The statement of claim was amended, setting up the claim under the first bond as well as under the second bond. While I am in thorough agreement with the general principle of law relied upon by counsel for the defendant, that an amendment will not be permitted which revives a claim which has once been barred (in support of which contention he cited as his authority *Schubert et al. v. Sterling Trusts Corporation et al.*, [1938] O.W.N. 133, a decision of the Master in which he follows the judgment of the Court of Appeal in *Ellis v. Pelton*, [1933] O.W.N. 191), yet it must be remembered that this order of the Master was not appealed from and that the issue proceeded to trial on the amended statement of claim.

I therefore feel free to deal with this matter of the limitation on the bringing of the action on the merits as disclosed herein.

I have earlier reviewed, in part, the correspondence between the parties following the discovery of the loss, in which reference is made only to the second bond, and to the mutual mistake or misunderstanding in connection therewith.

On the evidence it is abundantly clear that from 17th November 1937 the defendant had knowledge that the loss, or a great part of the loss, was sustained during a period before the issue of the second bond, namely, 7th July 1937; that the defendant until 16th February 1938, in all correspondence of itself and its agents and in conversations of its agents, referred only to the second bond, despite the fact that Mr. Butler, the manager, said that from the outset he well recognized that there was a claim under both bonds.

By its letters of 8th July 1938, 5th August 1938, 8th September 1938, 7th October 1938, 7th November 1938, and as late as 6th December 1938, Exhibits 75 to 77 inclusive, the defendant repeatedly wrote the plaintiff advising the plaintiff that the defendant was holding the plaintiff covered under brokers' blanket bond No. 1599711 *pending the settlement of the outstanding claim*.

During the period of this group of letters, it should have been well known to the defendant that any claim under the first bond was expiring on 17th November 1938, by reason of the twelve months' limitation. The fact that there was a twelve months' limitation period under the first bond, was according to Mr. Butler's evidence, brought to his attention by the defendant's "claims man" within a month after 18th November 1938. Butler stated that on 6th December 1938, when he wrote the letter, Ex. 77, he had given up hope of an amicable settlement of the claim, but that, before the issue of the writ, no intimation was given to the plaintiff that the claim would not be settled amicably.

Subsequently, on 23rd April 1938, Mr. Patterson, the chartered accountant employed by the defendant, expressly invited the plaintiff to submit further material in proof of the loss, thus, in effect, again waiving what might be the contractual limitation of twelve months for action.

During the period prior to the issue of the writ, it was sworn to by Mr. Mooney, and not contradicted in any way, the defendant's agent Watson telephoned him on several occasions and

reminded him that the plaintiff had fifteen months in which to issue the writ for the claim.

Further, Mr. Butler swore that the defendant was prepared to pay under the first bond up until the time they (the plaintiff) had to issue the writ, but that after the passing of that time, the defendant considered the first bond "washed up"; and that the defendant never suggested to the plaintiff any difference with respect to bringing action under the old bond and the new.

I must find on the evidence that throughout the whole period the defendant, by its conduct, lulled the plaintiff into a sense of security and induced the plaintiff to proceed on the assumption that the period for bringing action was a fifteen-month period, as set out in the second bond, and that by its conduct the defendant waived the limitation period of twelve months as set out in the first bond, and is now estopped from claiming the benefits thereunder. This conclusion is supported by my understanding of the law in respect thereto, which is tersely summarized in Macgillivray on Insurance Law, 2nd ed., p. 1111, thus:

"If the insurers cause delay in the settlement of the loss, or induce the assured to refrain from commencing proceedings by promise of payment, or definite hopes of settlement, the condition may be held to be waived (*Curtis v. Home Insurance Company* (1865), 1 Biss. 485; *Steel v. Phenix Ins. Co.* (1892), 51 Fed. 715), or the period may be held to have been enlarged by suspension of the condition during the negotiations for settlement (*Lynchburg Cotton Mill Co. v. Travelers' Ins. Co.* (1905), 140 Fed. 718)."

The law is similarly enunciated in Porter's Laws of Insurance, 7th ed., at p. 200:

"Failure to bring the action within the time limited in the policy is no bar where it was induced by the representations of the defendant's agents that the loss would be paid, and where the defendant demanded and accepted payment of premiums after the loss occurred." *Thompson v. Phenix Insurance Company* (1890), 136 U.S. 287; *Steel v. Phenix Ins. Co.* (1892), 51 Fed. 715.

After thus disposing of those of the defendant's contentions which, in the words of Hudson J. in *Canadian National Railway Company v. Canadian Industries Limited*, [1941] S.C.R. 591, [1941] 4 D.L.R. 561 (at p. 598, S.C.R.) "are purely technical and without merit and should not be upheld", I come to what may possibly be considered the main contention offered by the

defendant by way of defence in resisting payment of the claim. This is a reliance upon clause 2(g) of the first bond and its counterpart in the second bond, *viz.*, clause 2(e), both of which in short provided that the coverage should not extend to any loss resulting directly or indirectly from trading.

The defendant suggests that the onus is upon the plaintiff to prove a loss within the coverage. This contention is not borne out in law where there is an alleged exclusion from the general coverage. See 18 Halsbury, 2nd ed., p. 434:

“An exception is not, strictly speaking, a condition. . . . An exception limits the scope of the insurance under the policy by exempting the insurers from liability for certain kinds of loss which would otherwise have fallen within its terms. The onus of proving that the loss falls within an exception, and that the insurers are accordingly exempt from liability, rests, as a general rule, upon the insurers . . . *Motor Union Insurance Company Limited v. Boggan* (1923), 130 L.T. 588, per Lord Birkenhead at p. 590.”

Undoubtedly in the broad sense of the term, Carlaw's actions might well be considered, upon first thought, to fall within the exception which will now be referred to as “trading losses”.

Earlier, I have quoted certain questions and answers appearing in the plaintiff's application, as being of some possible pertinence to this phase of the defence herein. It would indeed seem that such information would be unnecessary, if not indeed useless, unless the defendant construed the bonds to indemnify the plaintiff against loss through a dishonest act of an employee, even though such dishonest act was in some way connected with a trading transaction. The demand for such information has a tendency to support the plaintiff's contention herein.

Without entering with greater particularity into the various types of dishonest act committed by Carlaw, these dishonest acts, whether dealing with real customers' accounts or fictitious customers' accounts, or in real or fictitious entries, had to do with trading, in the sense that, had it not been for the trading facilities which were the basis of the assured's business, it would have been impossible for Carlaw to have carried on dishonest acts of the nature, and in the manner, which he did. But in looking at the original coverage, clause (A) in the first bond, as amended by the dishonest act rider, and by clause (A) in the second bond, it must be noted that the protection afforded

by the bond is against "*any dishonest act of any of the employees wherever committed and whether committed directly or by collusion with others.*" (My italics.) The coverage of the second bond is broader in its language, if anything, namely "any loss through any dishonest, fraudulent or criminal act of any of the Employees, including loss of property through any such act".

Owing to the very nature of the business conducted by the insured, "any dishonest act" of an employee, it would seem obvious, must of necessity be in connection with some trading transaction, and hence any such loss would be a "trading loss". I find it difficult to appreciate "any dishonest act" of an employee in the course of his employment, which, either directly or indirectly, and however remotely, would not be related in some way with a trading transaction—but, conversely, many an employee's association with a trading transaction might well result in a trading loss to his employer without there being any dishonesty attributable to the employee. Moreover, although "dishonest acts" were evidently in contemplation for certain limited purposes only, *e.g.*, clauses 2(d) and 2(i), at the time of the original issue of the first bond, the coverage as provided by clause (a) was narrowed to "theft, as defined by the Criminal Code of Canada, committed by any of the employees." With "theft" therefore as the limit of the scope of the coverage, is it reasonable to consider that the "trading losses" exclusion in clause 2(g) was a qualification of the coverage in clause (a)? I hardly think so.

With the change in clause (a) of the first bond in 1935 by the attachment of a rider, the coverage of the bond included not only the hazard of "theft", but a very enlarged field, *viz.*, "loss through any dishonest act". Can it therefore be prudently contended that, while patently enlarging the protection it was offering to the insured, the insurer was by the same stroke of the pen, nullifying this increased coverage by invoking clause 2(g)? Again I fail to think so. The language of exclusion must be strictly construed against narrowing the broad coverage of the insuring clause, and the exclusion clause should be held to exclude only that which is clearly expressed by the words of the exclusion clause when read in conjunction with the general coverage clause. In Welford's Law relating to Accident Insurance, 2nd ed., p. 114, it is said:

"Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurers with the utmost strictness".

During the submission of the evidence I suggested that if the defendant's contention as to the effect of this exclusion were to prevail, then, indeed, it would appear that the plaintiff had paid a very substantial premium for an ostensible dishonest act coverage which proved in fact to be an empty shell. It strikes me that reading the bond in its entirety, and bearing in mind, as I have said, the nature of the plaintiff's business, namely, the buying and selling of securities, *i.e.*, "trading", I must hold that clause (e), excluding trading losses from the general coverage, must be considered as subject to the same qualification as the exclusion of loss by forgery in clause (a), loss through theft, clause (d), and loss of property contained in customers' safe deposit boxes, clause (i), are expressly stated to be, namely, unless through the dishonest act of an employee. The phrase in clause (g) "notwithstanding any act or omission on the part of any employee" can only refer, in my opinion, to some innocent but erroneous act or omission of such employee, not to any dishonest one, which is the very essence of the general coverage in clause (A) of each bond. In this view, I find particularly apt, and I am entirely in accord with, the well-reasoned conclusion expressed by Major J. in the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Paddleford et al. v. Fidelity & Casualty Co. of New York; The same v. Hartford Accident & Indemnity Co.* (1938), 100 Fed., 2nd series, 606, which was cited to me in the arguments of both Mr. Gray and Mr. Lawson.

This was an appeal from a trial judge whose judgment was reversed with a direction to enter judgment and assess damages for the plaintiffs. Following the procedure recognized in that jurisdiction, and subsequent to the judgment of the Circuit Court of Appeal, an application was made by the defendant companies for a rehearing by the Circuit Court of Appeal of the argument. This rehearing was denied and then the matter was carried to the Supreme Court of the United States on a *certiorari* application, as reported in 306 U.S. 664. The Supreme Court denied the *certiorari*, and therefore the judgment of the Circuit Court of Appeal stands.

I well recognize that such a decision of a foreign court is not binding in any way upon this Court, and yet, as was said by Lord Atkin in the House of Lords in *Beresford v. Royal Insurance Company, Limited*, [1938] A.C. 586, at p. 600:

"I attach much importance to uniformity of result in the Courts of the two countries in matters of such strong mutual interest as the law of insurance."

A similar sentiment was expressed in the Court below, namely, the Court of Appeal by Lord Wright M.R., [1937] 2 K.B. 197 at p. 216:

" . . . and it has often been said that it is desirable to have uniformity in the law of contracts as far as possible in our two countries."

No English or Canadian decision on the construction of the "dishonest act" clause, in conjunction with the "trading losses exception" clause, could be found or was cited to me by any of the counsel appearing in this case. A perusal of the record and report in the *Paddleford* case cannot fail to impress one with the similarity of the circumstances existing in it with those of this case. The phraseology of the bond in question in each is almost identical. In the *Paddleford* case the defalcation of the employee who was employed by a brokerage firm, had in many respects a marked similarity to the *modus operandi* of Carlaw in this case. In each case the losses were sustained as a result of the employee's trading activities, and while fraudulent, fictitious and unknown to the employer, they were the result of trading, real or fictitious, with respect to which duties and opportunities for wrong-doing fell to the employee, within the scope of his employment, and for which the plaintiffs were responsible. May I quote at some length the conclusion of the Court in the *Paddleford* case, after a very full review of the facts and the authorities relied upon by counsel in argument before such Court:

"We reach the conclusion that the language of the bonds which indemnified the plaintiffs against any loss incurred 'through any dishonest act of any of the employees, wherever committed and whether committed directly or by collusion with others' was intended to and did indemnify the plaintiffs against the very type of loss which they sustained in this case and that the language of sub-section (f) was not intended to exclude coverage of any loss incurred through a 'dishonest act'. We

think this construction does no violence to the language of subsection (f) and does not render it nugatory as claimed by the defendants. It is reasonable to conclude that it was intended, not as a limitation upon losses sustained through the dishonest act of an employee, but rather upon those which were not dishonest, and we apprehend, in a business of this character, there are many losses the result of acts other than those dishonest. For instance, trading losses incurred by plaintiffs through their own trading or through trading by customers who fail to meet their commitments, or because of mistakes made in filing orders for customers, or for negligence in failing to insist that the accounts of customers be properly margined, or errors of employees in recording trades, or in failure to notify customers of purchases or sales, or numerous other types of losses which brokers, no doubt, suffer on account of trades which are not the result of the dishonesty of an employee. This construction, we think, is reasonable, in view of the nature and character of the business in which plaintiffs were engaged. To us it borders on the preposterous to say that it was the intention of the parties to indemnify plaintiffs against the loss occasioned by a dishonest employee and at the same time make this indemnity unavailing if the loss was occasioned while engaged in trading, the precise business in which plaintiffs were engaged as defendants well knew. It is not consistent with our sense of justice to say that either of the parties intended that the plaintiffs in one breath should be given protection, and in the next, taken away. It would be just as logical to insure an employer against liability incurred because of an injury to an employee and then limit the protection so that it would not apply in case the employee was injured in the course of his employment, or to insure a bank against the dishonest act of its employees and then limit the protection so as to make it nugatory if the bank sustained a loss while the employee was behind the cashier's window. If this contract was not for the purpose of protecting the assured from the dishonest acts of its employees, committed in the usual course of its business, it is difficult to comprehend what purpose it served. Surely it did not furnish coverage for dishonest acts occurring in some business other than that in which plaintiffs were engaged. . . . We think there is sufficient doubt as to its meaning to bring into force the rule so often announced, that a construction should

be had, if possible, which will effectuate the insurance and not defeat it."

Mr. Evan Gray, in his argument, contended that the whole of the plaintiff's loss could be made collectible under and by virtue of the first bond, which was a bond for a period from 7th July 1934, and until terminated or cancelled according to the provisions of Condition 11 hereinbefore quoted. This condition requires termination of the bond in its entirety by notice in writing. It is admitted that no such notice in writing was given at any time.

Bond No. 2, as earlier intimated, varied the provision for termination by adding the words "or in any other manner".

Had the first bond corresponded in wording to the second bond, then it might well have been considered that the first bond was terminated by the substitution of the second bond. However, it can hardly be argued successfully that a substitution of the second bond for the first, in the circumstances here existent, could operate as a written notice of termination of the first bond. The defendant must abide by the wording of the contract drawn by it. Therefore I am of the opinion that the first bond is a continuing bond until notice in writing is given for its termination. This would be in accordance with the provisions of The Insurance Act, R.S.O. 1937, c. 256, as to the position when once a policy is delivered to the insured, and even although the premiums may not be paid. It has repeatedly been held that in such circumstances the insurer can sue for the premium. I think the plaintiff is here entitled to rely upon the continuity of the first bond, and upon the protection of its coverage not only up to 7th July 1937, but beyond it to 17th November 1937. This would mean that there would be a total coverage under both bonds in a gross sum of \$50,000. It has well been said that it was not the intention that the gross coverage should be in excess of \$25,000, but again, I fear, the defendant must abide by its bond. Even were effect to be given to the defendant's contention, *viz.*, that the first bond only covers losses prior to 7th July 1937, I am of the opinion that by reason of the waiver and estoppel of the defendant hereinbefore discussed and determined by me, the plaintiff is entitled to recover for the defalcation of Carlaw proved to have been prior to 7th July 1937, under the first bond—and, of course, also to recover under the second

bond for the defalcations occurring after 7th July 1937 and to 17th November 1937.

In his examination of witnesses, defendant's counsel entered upon the matter as to whether or not the commissions earned by the plaintiff on fictitious trading carried on by the defalcator should not be deducted from any claims for loss. This feature has not been dealt with by the defendant's counsel in his written argument. Were it so advanced, I fear I could not give effect to it, despite the collection of certain commissions on certain of the business so accruing to the plaintiff. The trading arising from the defalcations undoubtedly occasioned various expenses to the plaintiff, which I think might fairly be offset against the matter of commissions.

As enumerated by Ex. 99, certain cash, various stocks and the equity in a motor-car, all the property of Carlaw's wife, were delivered by her to Fetterly, the investigator engaged by the defendant, to be delivered by him to the plaintiff "as partial restitution for defalcations on the part of my husband." While this exhibit is dated in 1938, the evidence indicated that it was executed in 1937, at which time this salvage was turned over to the plaintiff, which has retained it pending the settlement of this claim. Certain stock of this salvage was only released to the plaintiff upon its satisfying a loan borrowed by Carlaw from a bank on its security. Strangely enough, although the salvage was delivered to the plaintiff, the letter of instruction in connection with it was not so delivered, but was retained and not disclosed by the defendant until during the trial. At the time of the recovery of these assets, both Carlaw and his wife were debtors of the plaintiff. It is well established in law that the mere existence of a surety does not, in the absence of express contract, take away from the principal debtor and creditor those powers which they would otherwise possess of appropriating payment. These powers of appropriation of the principal debtor and creditor are equally well settled, *viz.*, where several distinct debts are owing by a debtor to his creditor, the debtor has the right, when he makes payment, to have the money appropriated to any debts he pleases, and the creditor is bound, if he takes the money, to apply it as directed. If the debtor does not make any appropriation at the time he makes the payment, the right devolves upon the creditor. Where only part of a debt is guaranteed by a surety the existence of a suretyship does not deprive

the debtor and creditor of their normal right of appropriation as set out above, nor has the surety the right to insist on appropriation being made to the guaranteed debt, unless the circumstances of the case, *i.e.*, the terms of the surety contract or otherwise, indicate that such was the intention.

The first bond, in clause 7 thereof, refers to recovery "on account of any losses hereunder", and the second bond, in clause 7 thereof, refers to recovery "on account of any loss coming within the coverage of the bond." There is clearly nothing in the letter (Ex. 99) or otherwise in the evidence, to indicate any intention of appropriation to losses, either secured or unsecured, but to losses in general. Failing a specific appropriation by the debtor Carlaw, or his wife, the creditor, *i.e.*, the plaintiff, clearly, in my opinion, has the right to appropriate the proceeds of the recovery first towards the satisfaction of those losses sustained by reason of Carlaw's trading in his wife's account, or such losses as may not be within the coverage of the two bonds, as hereinbefore determined. Any excess thereafter should be paid to the defendant or applied in the terms of each clause 7, to that part of such loss for which the defendant is liable.

Early in the trial the plaintiff's counsel moved to strike out from the record the particulars which were furnished by the plaintiff in response to an order of the Master, and in elaboration of the plaintiff's original statement of claim. Subsequent to these particulars, leave was given, as previously intimated, to the plaintiff to amend the statement of claim. The plaintiff now suggests that the particulars are irrelevant and may be misleading in view of the amended statement of claim. While one may readily agree with this contention, and therefore with the logic of striking out the particulars, the defendant objects to such striking out, as their presence discloses more clearly the progress and development of the plaintiff's action. It being kept clearly in mind the juncture at which these particulars were furnished, and the subsequent amendment of the statement of claim, I cannot appreciate that anyone will be misled or prejudiced at this stage of the litigation by leaving the particulars where they are.

In view of the foregoing reasons, I direct that judgment be entered for the plaintiff for the sum of \$21,724.68, subject to any adjustment occasioned by reason of salvage; provided, however, that if this be not the sum agreed upon by the parties

as falling within the proof of loss, and if it be desirable that there be a reference to the Master at Toronto to determine the loss under either or both bonds, such a reference will be directed in the formal judgment, and prior thereto counsel may speak to the matter further, if necessary.

Costs to the plaintiff.

Judgment for plaintiff with costs.

Solicitors for the plaintiff: Lawson & Stratton, Toronto.

Solicitors for the defendant: Phelan, Richardson, O'Brien & Phelan, Toronto.

[PLAXTON J.]

King v. Freeman.

Timber—Construction of Contract—Term—Proviso for Removal within Specified Time—Meaning of “trees, timber and wood” — Whether Finished Lumber Included.

C. granted to the defendant, by deed, “all the trees, timber and wood of every nature and kind now standing, growing, lying or being on, in and upon” certain lands, “to hold the said trees, timber and wood and every part thereof to the Purchaser to and for his sole and only use; provided, however, that the Purchaser remove the same and every part thereof from the said lands and premises within six years from the date hereof, after which date all timber, trees and wood not removed shall revert to and be and become the property of the Vendor.” The defendant alleged that by a subsequent oral agreement between him and C. this term had been extended for a further year.

Held, on a proper construction of the deed, the words expressed as a proviso constituted a condition rather than a covenant. It was not an absolute grant of all the trees, subject to a covenant by the defendant to remove them within six years, but a grant for a limited term only. *Johnston v. Shortreed et al.* (1886), 12 O.R. 633, followed. It followed that any “trees, timber and wood” not removed from the lands within the stipulated time became the property of C. at the end of that time.

Held, further, the onus of establishing the alleged extension was upon the defendant, and he had failed to discharge that onus. Further, the grant undoubtedly conveyed an interest in lands. *In re Refund of Dues Paid under Timber Regulations*, [1935] A.C. 184 at 193; *Handy v. Carruthers et al.* (1894), 25 O.R. 279, applied. It was therefore required by the Statute of Frauds to be evidenced by a memorandum in writing, and could not be varied by parol evidence of a subsequent oral agreement.

Held, further, the “proviso” did not constitute a penalty or forfeiture against which the Court, in the exercise of its equitable jurisdiction, would relieve. It had merely the effect of rendering the defendant’s title defeasible at a certain time. and the defendant, in this plea, was seeking to be relieved, not against a penalty, but against the terms of his own bargain. *Biags v. Hoddinott*, [1898] 2 Ch. 307 at 313; *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company* (1908), 17 O.L.R. 462 at 483, applied.

Held, finally, finished lumber piled upon the land did not fall within the words “timber, trees and wood”, and accordingly did not revert to C.

at the end of the six years. The defendant therefore, in entering upon the land after the end of that time, and removing the lumber, was guilty of a technical trespass, but was not guilty of conversion, or liable for the value of the lumber so removed. *Vincent v. Spicer* (1856), 22 Beav. 380 at 383, 52 E.R. 1154; *Re Fletcher* (1914), 31 O.L.R. 633, 19 D.L.R. 624; *Baxter v. Kennedy* (1900), 35 N.B.R. 179, applied. He was, however, liable for the value of cord wood and stove wood similarly removed.

AN action for damages for the removal of wood and lumber. The facts are fully stated in the judgment.

23rd and 24th October 1941. The action was tried by PLAXTON J. without a jury at Simcoe.

D. E. Kelly, for the plaintiff.

W. P. Mackay, K.C., for the defendant.

24th September 1942. PLAXTON J.:—In this action the plaintiff Samuel Lindsay King, executor of the last will and testament of Charles Wood Culver, deceased, seeks to recover from the defendant Henry A. Freeman, by virtue of the terms of the agreement hereinafter referred to, the sums of \$1,100.00 and \$2,177.50 in respect of the value of certain quantities of lumber and wood alleged to have been wrongfully removed by the defendant or his servants from the lands described in the said agreement, and converted by him to his own use. In the alternative, the plaintiff claims to recover the said sums by way of damages for the wrongful conversion by the defendant of the quantities of lumber and wood in question, and also \$200.00 damages for trespass by the defendant, or his servants, upon the lands in question, as well as certain other relief.

On the pleadings and the evidence, it is not a matter of dispute that the late Charles W. Culver during his lifetime by a deed of conveyance (Ex. 1), dated 21st January 1935, and registered in the Registry Office for the Registry Division of the County of Norfolk on 23rd January 1935, granted to the defendant, in consideration of the payment by him of the sum of \$2,750.00:

“ . . . all the trees, timber and wood of every nature and kind now standing, growing, lying or being on, in and upon all and singular that certain parcel or tract of lands and premises and being composed of the North Half of Lot number Seven in the Fifth Concession of the Township of the Township [*sic*] of Charlotteville in the County of Norfolk and Province of Ontario containing One Hundred acres of land more or less.

“TO HOLD the said trees, timber and wood and every part thereof to the Purchaser to and for his sole and only use; PRO-

VIDED, however that the Purchaser remove the same and every part thereof from the said lands and premises within six years from the date hereof, after which date all timber, trees and wood not removed shall revert to and be and become the property of the Vendor. PROVIDED the Purchaser, his servants, agents and workmen shall at all times within six years from the date hereof have full and free entry and right of way through over and upon the said lands for the purpose of felling, cutting down, sawing and carrying away the said timber, trees and wood in such manner as he or they shall think, and also to pile said timber, trees and wood on said lands and premises, and with full liberty to bring horses, oxen or other animals, wagons, sleighs or other vehicles in and upon said lands and premises for said purposes. AND THAT the Purchaser will fell, cut down and carry away the said timber, trees and wood, together with boughs and tops if he so desires, on or before the twenty-first day of January, A.D. 1941."

These are the provisions of the said deed mainly material to the consideration of the issue raised in the present action, although other provisions of the instrument may hereinafter be incidentally referred to.

In defence, the defendant pleads:

First, that by a subsequent agreement between him and Charles Wood Culver, he was authorized to remove timber, trees and wood after the period of six years referred to in the said deed, and that any trees, timber and wood removed by him subsequent to that date were so removed pursuant to and in accordance with the said subsequent agreement.

Secondly, that the lumber referred to in the plaintiff's statement of claim was the property of the Preston Lumber Company of Preston, Ontario, and, if removed, was removed by this company and not by the defendant.

Thirdly, in the alternative, that the proviso to the habendum clause in the said deed, (whereby it was stipulated that, after the expiry of the said six-year period, all timber, trees and wood not removed should revert to and be and become the property of the Vendor), involves a penalty or forfeiture against which the Court should afford him relief.

Arguendo, Mr. Mackay, counsel for the defendant, raised a further point which is not pleaded in the statement of defence, namely, that the lumber which was piled on the lands in question

on 21st January 1941, the date on which the grant to the defendant expired, and was subsequently removed by him, does not fall within the connotation of the words "all timber, trees and wood", so as to revert to and become the property of the grantor under the terms of the proviso to the habendum clause in the said grant, and therefore continued to be the property of the defendant. The fact that there was a quantity of lumber piled on the said lands on 21st January 1941 is expressly pleaded in para. 11 of the statement of claim, and at the trial evidence was led for the plaintiff to that effect—and Mr. Mackay, counsel for the defendant, admitted it to be the fact—that there was, at that date, piled upon the said lands 29,692 feet b.m. lumber. That fact being undisputed, the question whether such lumber reverted to and became the property of the grantor under the terms of the grant appears to me to be reduced to one of construction of the words of the proviso to the habendum clause in the said grant. Counsel for the plaintiff raised no objection to the fact that this point had not been pleaded by the defendant, and, indeed, endeavoured in argument to answer it. However, I apprehend that the defendant would have had the right to amend by setting up this plea at the trial and that leave to amend should now be given: see, *e.g.*, *Danforth Heights Limited v. McDermid Brothers*, 52 O.L.R. 412, at 421, [1923] 4 D.L.R. 757. I shall, therefore, discuss the question upon the footing of there being such a plea on the record.

In the first place, what is the legal nature and effect of the conveyance made by the late Mr. Culver to the defendant? This grant does not appear to be distinguishable, in pith and substance, from the deed which was the subject of the decision of the Queen's Bench Division in *Johnston v. Shortreed et al.* (1886), 12 O.R. 633. I consider that the construction placed upon the deed in that case by the majority of the Court is the construction which ought to be placed on the conveyance now under consideration. In that case, by deed dated 4th April 1874, made between J. and S. & L., J. agreed to sell, and S. & L. to purchase, all the merchantable pine suitable for their purposes, standing, lying and being on certain described property, for a sum which was then named and paid, "Provided, however, that the said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884." The construction placed upon this instrument by the majority of the Court is indicated by the

passages quoted below from the judgment of Wilson C.J., Armour J. concurring. The learned Chief Justice, at p. 637, after referring to the case of *Stukeley v. Butler* (1615), Hob. 168, 80 E.R. 316, said:

"This agreement cannot, however, be construed as an absolute grant of the pine trees suitable for the business of the grantee, subject to a covenant by him to cut and remove the trees within the ten years. It is a grant of the pine trees subject to the condition by the words, 'Provided, however, that said timber and logs shall be cut and removed off said lot on or before the 4th of April, 1884.'

"*Provided* is in this case a condition, not a covenant: *Shepard's Touchstone*, 122, 123; so that if the trees are not cut and removed within that time, the grant is determined, and if they are removed by that time the subject of the grant is gone. If the grant had been just as it is in the general form, with a covenant by the grantor to cut and remove the timber within the ten years, the trees would have passed absolutely to the grantee, and if he cut after the ten years, the trees would still have been his property, but he would have been liable on his covenant for not having cut within the ten years.

"That is not this case. The term of ten years was the limitation of the grant, by the term of ten years being stated by way of condition. It is quite clear from Hobart, 173, the grant of the trees without limitation is the grant of a chattel, and the subject of the grant will pass to the personal representatives as personal property.

"In Vin. Abr. 'trees', H. pl. 1, 3, 9, the trees, if granted, are held to be chattels, although an inheritance may be had in a tree: *Richard Liford's Case* (1615), 11 Co. Rep. 46a at 49a, 49b, 2 Inst. 403, 77 E.R. 1206.

"In *McGregor v. McNeil* (1882), 32 U.C.C.P. 538, it was held that the purchaser of pine timber, to be removed within a certain specified time, had the right to remove the timber after the time had expired, which he had cut within the time named; for the timber had become his property by severance. The contract in that case was a mere writing given by the grantor that he had sold to the grantee all the pine timber upon the particular lot for \$60, 'said timber to be taken off during the year of 1880 and 1881'.

"It was not a question there whether the grantee had not obtained an absolute right to the pine timber for life, subject to liability if he did not remove it within these years. If that was the relative position of the parties, as it would seem to have been from the case in *Hobart*, the plaintiff rightly succeeded in his replevying of the timber which the owner of the land had seized. That trees may be sold as chattels is quite settled, for they are in fiction of law thereby removed from the land: 11 Co. Rep. 50a.

"The defendant Barr cut and removed timber after the expiration of the ten years. I am quite clear Barr had not the right *to cut* after the end of that term; for his grant was subject to the common law *condition*, the legal effect of the *proviso* in the agreement, that the logs and timber should be cut and removed by that time.

"The *trees* at any rate under this condition ceased to be any longer chattels, and became again parcel of the freehold. They may be likened to tenants' fixtures, that must be severed from the purchase before the expiration of the term, and if not severed before then cannot be severed after, for they become, or rather remain then parcel of the freehold.

"The tenant's fixtures themselves are not saleable as goods and chattels while attached to the freehold, but *the right of severance* of them is saleable: *Lee v. Gaskell* (1876), 1 Q.B.D. 700; *Hallen v. Runder* (1834), 1 C.M. & R. 266, 149 E.R. 1080.

"I do not cite any other of the numerous cases on tenant's fixtures, nor upon the sale of trees.

"I find no difficulty in deciding that Barr had no right to cut after the end of the ten years. The question then is, had he the right to remove from the land the trees he had cut before the end of the term? The evidence shewed that nearly all the trees removed by Barr after the term were trees and logs cut by the plaintiff after the term.

"The cutting before the term expired was lawful; but the condition, by reason of the word *provided*, applies as well as to the removal of the trees from the land which had been cut before the end of the term as to the further cutting.

"It is true the property in the trees, which were cut within the term, became vested in the grantee, but not more so than the property in the trees themselves had been vested in him before they were cut; and if he could not cut the trees after

the term had expired, I do not see what greater right he had to remove after the term those he had cut within the term, for by reason of the *condition* the defendant Barr could no more remove after the end of the ten years the trees cut within the term than he could after the end of the term cut trees any longer under that grant."

It follows, on the authority of this decision (which seems to me to be clearly in point), that, under the deed now in question—assuming that it was not effectively modified by any subsequent arrangement between the parties—whatever may be held on a proper construction to fall within the connotation of the words "all the trees, timber and wood" standing, growing or lying on the property described in the deed, became, on the expiry of the demised term of six years, the property of the vendor, namely, the late Mr. Culver.

The present is, indeed, a stronger case than *Johnston's* case in that the deed in this instance contains what was absent in the former case: an express provision for reverter to the grantor of "all timber, trees and wood" which had not been removed from the lands described in the grant upon the expiry of the six-year term.

The defendant claims, however, that the said deed was modified by an agreement which he later made with Mr. Culver whereby the demised term was extended for the period of one year, namely to 21st January 1942. The onus is upon him to establish by satisfactory proof the existence of this alleged extension agreement. The Evidence Act, R.S.O. 1937, c. 119, provides by s. 11:—

"In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

[The evidence on this point is here analysed, and the judgment proceeds:]

In view of all the circumstances, I feel justified in concluding that the defendant has failed to adduce satisfactory proof of the alleged extension agreement. He has, on that view, not discharged the onus resting upon him.

Assuming, however, that I am wrong in this view and that the defendant's evidence, corroborated by that of the witness Treagis, ought to be accepted as satisfactory proof of the alleged extension agreement, the defendant, nevertheless, seems to me to encounter an insuperable legal difficulty. The original conveyance from Culver to the defendant undoubtedly concerned an interest in land. The defendant's right to cut and remove from the lands in question trees, timber and wood was not merely a licence but an interest in the lands: *In re Refund of Dues Paid under Timber Regulations*, [1935] A.C. 184 at 193, [1935] 2 D.L.R. 1, [1935] 1 W.W.R. 607; *Handy v. Carruthers et al.* (1894), 25 O.R. 279, and, therefore, was required by the Statute of Frauds to be evidenced by an agreement in writing. It is well settled by the decisions of the English Courts as well as of our own, that such an agreement cannot be varied by parol evidence of a subsequent oral agreement: *Morris v. Baron and Company*, [1918] A.C. 1; *Goss v. Lord Nugent* (1833), 5 B. & Ad. 58, 110 E.R. 713; *Nugent v. Davies*, 53 O.L.R. 458, [1923] 1 D.L.R. 1040, and Taylor on Evidence, 12th ed., vol. 2, p. 703, where many of the older English decisions are cited.

Mr. Mackay contended that parol evidence of an oral agreement to vary a written agreement required by law to be evidenced in writing is admissible where such evidence is adduced, not for the purpose of enforcing the original agreement, but for the purpose of showing why the original agreement should not be enforced; that the alleged extension agreement in this case amounted to a waiver of the terminal date of the original agreement, as distinct from a variation or alteration of the agreement. But this is not in truth a case of waiver at all; see Ewart's Waiver Distributed, pp. 135, 142, 143. What the defendant in reality seeks to establish is an agreement between the parties, the grantor and the grantee, for an extension of the defendant's privileges under the original deed for the term of one year, namely, to 21st January 1942. An extension of the time fixed by the original deed for the termination of the grant would undoubtedly involve an alteration or variation of one of the terms, a fundamental term, of the grant, and must be evidenced in the same way as the original grant was required to be evidenced, namely, by a new agreement in writing. It is, I apprehend, the law, as stated by Lindley J. in *Hickman v. Haynes et al.* (1875), L.R. 10 C.P. 598 at 605, that "neither a plaintiff nor a

defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds", or as put by Viscount Haldane in *Morris v. Baron and Company*, [1918] A.C. 1, at 16, " . . . where an agreement is validly entered into which has had to comply with the Statute of Frauds, and variations are afterwards sought to be introduced by parol or by a document which does not comply with the statute, these variations cannot be set up even by a defendant as an answer in proceedings to enforce the original agreement."

The defendant's next plea is that the lumber removed from the property in question belonged to the Preston Furniture Company, Limited. However, at the trial, Mr. Mackay conceded that the agreement made in 1940 by the defendant with the company was merely an agreement to sell and was not a sale, and that the property in the lumber and wood in question remained in the defendant until it was actually sold and delivered to the company. He admitted that the property in the lumber and wood in question was in the defendant on 21st January 1941. This plea, accordingly, fails.

It was next contended for the defendant that the provision in the deed (Ex. 1) that all timber, trees and wood not removed from the lands in question within the six-year period should revert to and be and become the property of the vendor, involved a penalty or forfeiture, against which the Court in the exercise of its jurisdiction in equity should, in any case, grant the defendant relief.

The word "penalty" applied to an agreement means a punishment for committing a breach of it: *Ellis v. Fruchtman* (1912), 3 W.W.R. 558, 22 W.L.R. 776, 5 Alta. L.R. 456, 8 D.L.R. 353. "The essence of a penalty is a payment of money stipulated as in terrorem of the offending party," *Dunlop Pneumatic Tyre Company, Limited v. New Garage and Motor Company, Limited*, [1915] A.C. 79, at 86. On the other hand, "forfeiture" is a penalty for breach of duty or breach of contract: *Empire Loan and Savings Co. v. McRae* (1903), 5 O.L.R. 710, at 711; *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company* (1908), 17 O.L.R. 462, at 473.

In my opinion the terms of the conveyance between the parties in this case involved neither penalty nor forfeiture. The grantee acquired no absolute estate or interest in "all the trees,

timber and wood" standing, growing, lying or being on, in or upon the lands demised; his estate or interest in the said "trees, timber and wood" was, under the terms of the grant, subject to the express condition "that the Purchaser remove the same and every part thereof from the said lands and premises within six years from the date hereof, after which date all timber, trees and wood not removed shall revert to and be and become the property of the Vendor." His estate or interest in the trees, timber and wood, whether standing, growing or lying upon the said lands, or whether cut or piled thereon, was thus by the express terms of the grant rendered defeasible. That is to say, it was determined and came to an end upon the expiry of the demised term on 21st January 1941. Whatever "trees, timber and wood" then remained upon the said lands reverted to and became the property of the grantor.

If this is the right interpretation of the terms of the grant embodied in the deed between the parties, then it becomes apparent that what the defendant is really seeking to be relieved against is the stipulations of his own bargain.

It is appropriate in this connection to recall the words of Romer J. in *Biggs v. Hoddinott*, [1898] 2 Ch. 307, at 313: "There is a great principle which I think ought to be adhered to by this Court, and by every Court where it can possibly do so; that is to say, that a man shall abide by his contracts, and that a man's contracts should be enforced as against him."

I also respectfully adopt, as applicable to this case, the statement of Meredith J.A. in *Johnston v. Dominion of Canada Guarantee and Accident Insurance Company*, *supra*, at 483: "It is impossible for me to think that the 57th section of the Judicature Act, R.S.O. 1897, ch. 51, [now s. 18 of R.S.O. 1937, c. 100] applicable to such a case as this, to think that it gives to any Judge power to—to use the words of a late eminent Master of the Rolls—'to run his pen through that part of the contract'; see *Eastern Telegraph Company, Limited v. Dent et al.*, [1899] 1 Q.B. 835, and *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417. To borrow again the words of a very eminent Judge, to give relief in this fashion, would be 'taking a prodigious liberty with a contract.' " The defendant's plea upon this point is, in my view, singularly destitute of substance.

The defendant finally contends that the 29,692 feet b.m. of lumber which, on 21st January 1941, the expiry date of the six-

year term, was piled on the demised lands and which was subsequently removed and sold by him, did not, under the terms of the proviso of the habendum clause of the grant, revert to and become the property of the grantor. This contention raises a point of construction: Is "lumber" within the connotation of the words "all timber, trees and wood" in that proviso?

To such a question I am disposed to apply the same principle of interpretation as was applied by Romilly M.R. in *Vincent v. Spicer* (1856), 22 Beav. 380 at 383, 52 E.R. 1154: " . . . the Court will, if it can, give a distinct and sensible meaning to every word in the clause and will give effect to it." And again, at p. 384, "the ordinary meaning which a person unacquainted with law and legal decisions would put upon it is the proper meaning."

In the first place, I am of opinion that "lumber" cannot be held to fall within the description of the words "trees" and "wood" in the context in which these words appear. These terms in that context must, of course, be understood in a sense which would exclude from their scope whatever constitutes "timber". "Trees" and "wood" are not synonymous terms. The latter refers to the substance of the former when cut for use. The old maxim is *Arbor, dum crescit; lignum cum crescere nescit*—a tree while it grows, wood when it cannot grow; that is, when it is cut down. See *Graham v. West* (1906), 55 S.E. 931 at 932. The use of the term "wood" as meaning the substance of trees is, of course, only one of several well-defined and recognized meanings of that term; among them, as given by Worcester are, "1. A large and thick collection of trees; a forest . . . 2. The substance of trees; trees sawed or cut for architectural or other purposes; timber. 3. Trees cut or sawed for fuel."

The term "wood" as used in the context now under consideration must, of course, be understood in a sense which would exclude "trees", the latter having been specifically mentioned; and in that sense it seems to be used in its commercial sense as designating the substance of trees; that is to say, trees cut or sawed for fuel.

It remains then to inquire whether "lumber" falls within the term "timber".

In *Re Fletcher* (1914), 31 O.L.R. 633, Middleton J., whose judgment was affirmed on appeal, said, at p. 637:

"The second question raised is the meaning of the provision that timber shall, notwithstanding the devise of the land, not form part of the property devised, but form part of the residuary estate. 'Timber' is, I think, to be confined to trees which are not ornamental and shade trees, and which are capable of being sold for manufacture into lumber."

This statement seems to imply that lumber is, in the strict use of language, something different from timber as such: that is to say, it is timber that has been converted by a manufacturing process into lumber. This view seems to be supported by the judgment of the majority of the Supreme Court of New Brunswick in *Baxter v. Kennedy* (1900), 35 N.B.R. 179. In that case the Court was called upon to construe s. 2(1) of The Woodmen's Lien Act, 1894 (N.B.), c. 24, which enacted that the words all "logs or timber shall mean and include what is ordinarily known as logs or timber, and shall not include cedar posts, telegraph poles, cord wood, railroad ties, tanbark or shingle bolts or staves." Hanington J. (Landry J. concurring), in discussing the terms of the definition above quoted, said, at p. 191:

"Mark the words 'ordinarily known'. They absolutely limit the scope or operation of the statute, and liens thereunder, to what is ordinarily here known as logs or timber. Now it seems to me very clear, that while in England deals are known in the market as timber, and their prices quoted as such in the market, that is not so in this country. 'Ordinarily known' means what is generally known or understood in this province, and I think it cannot be contended with any hope of success, that deals and sawn lumber have been or are now generally called timber. When timber is spoken of in our commercial and other circles, squared trees are referred to as are round trees as they come from the woods by the name of logs." In accordance with this view is the statement in 38 Corpus Juris, p. 145, that "'Lumber' . . . means more than ordinary logs. It is timber sawed or split for use in buildings, that is, the manufactured product of logs." Murray's New English Dictionary defines "lumber", in its North American sense, as meaning "timber sawn into rough planks or otherwise roughly prepared for the market." Funk & Wagnalls New Standard Dictionary defines "lumber" as meaning, in the United States and Canada, "timber sawed into merchantable form, especially boards." The Century Dictionary defines "lumber" as meaning "timber sawed or split for use, as beams, joists,

boards, planks, staves, hoops and the like." The definition in Webster's New International Dictionary is similar.

On the authority of these decisions and lexical definitions, and having regard to what I understand to be the common usage of language in this Province, I am of opinion that lumber does not fall within the connotation of the words "all timber, trees and wood" in the proviso to the habendum clause of the grant now under consideration, and that the lumber which was piled on the demised lands on 21st January 1941, continued, notwithstanding the expiry of the grant upon that date, to be the property of the defendant. He was, no doubt, guilty of trespass upon the said lands in connection with the subsequent removal of the lumber, but the plaintiff in his evidence frankly conceded that no damage resulted from such trespass. It was, therefore, a technical trespass only.

In the result, the plaintiff's claim is allowed in respect of the value of 267 cords of 4-ft. cordwood and of 50 cords of stove wood which the defendant removed from the lands in question after 21st January 1941, and converted to his own use. Several witnesses gave evidence as to the value, in January 1941, of cord and stove wood. The value they placed on these species of wood differed considerably. I have concluded that justice will be done between the parties if I allow the value of the cordwood at \$4.00 per cord and of the stove wood at \$2.50 per cord.

There will, accordingly, be judgment for the plaintiff for the sum of \$1,193.00, and as success is divided between the parties there will be no order as to costs.

Judgment for plaintiff for \$1,193.00 without costs.

Solicitor for the plaintiff: David E. Kelly, Simcoe.

Solicitors for the defendant: Mackay & Innes, Simcoe.

[COURT OF APPEAL.]

McIntosh v. McIntosh.

Foreign Judgments—Finality—Proof—Lex fori.

Conflict of Laws—Proof of Foreign Law—Evidence of Expert.

An action will lie in Ontario upon a foreign judgment ordering the payment of money only if that judgment is final, in the sense that, in the Court in which it was pronounced, it finally and conclusively established the existence of a debt, so as to make it *res judicata* between the parties. *Nouvion v. Freeman et al.* (1889), 15 App. Cas. 1 at 9, applied. It follows that such a judgment will not be enforceable in Ontario if the Court by which it was pronounced retains power to vary its judgment in respect of the sums sued for. Whether or not a judgment is final in this sense must be determined according to the law of the country in which it was pronounced.

In an action brought upon a judgment of a Quebec Court, made in an action for alimony, and corresponding to an order for interim alimony under the Ontario practice, the only evidence as to the finality or otherwise of the judgment was that of an advocate practising in that Province, who gave it as his opinion that the order was a final one. This witness cited no cases or texts of law. *Held*, this evidence was not satisfactory in the circumstances, and there should be a new trial.

Practice—Specially Endorsed Writ—Default of Defence—Rights of Plaintiff—Rules 121, 355, 356.

Where an action is commenced by a specially endorsed writ, the plaintiff's only right, if the defendant fails to file a defence, is to sign default judgment under Rule 355. He has no right to note the pleadings closed, under Rule 121, and to set the case down for trial, nor is Rule 356, providing for a motion for judgment, applicable in such circumstances.

AN appeal from the judgment of Hogg J., delivered after the trial of the action without a jury at Hamilton.

The plaintiff sued the defendant, her husband, in the Superior Court of the Province of Quebec, for alimony. An order was made in that action, on motion, requiring the defendant "to pay Plaintiff a provisional allowance of \$165.00 per month", but reserving to him "the right to apply for a reduction of said alimentary allowance." This action was brought in the Ontario Courts for arrears of the payments owing under that order. The Quebec action had not been tried when the Ontario action was launched, or at the time of the trial before Hogg J.

The defendant pleaded that the Quebec judgment was obtained by fraud, in that the plaintiff had failed to disclose the fact that she had received large sums of money belonging to the defendant; that he was neither domiciled nor resident in Quebec when the judgment was obtained, and that he was not personally served in the Quebec action. He also set up a counterclaim, alleging that the receipt of the above sums of money by

his wife was illegal under Quebec law, and claiming the return of these sums.

The trial judge gave judgment for the plaintiff for the amount claimed, and dismissed the counterclaim.

10th and 11th September 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and MCTAGUE JJ.A.

G. T. Walsh, K.C. (*T. R. Sloan* with him), for the defendant, appellant: There has been no trial of the Quebec action, which is still pending, and under the authorities the order sued upon in this action is not a final judgment, but merely an interlocutory order rendered in the course of a pending action. The learned trial judge followed his own decision in *Meyers v. Meyers*, [1935] O.W.N. 547, but that case is distinguishable, since there the foreign judgment was one delivered after trial. We submit that the leading case on this question is *Maguire v. Maguire* (1921), 50 O.L.R. 100, 64 D.L.R. 180, which has been followed consistently in our Courts.

[ROBERTSON C.J.O.: What is the effect of a "provisional" judgment?] It is nothing but an order for interim alimony. [ROBERTSON C.J.O.: Why can an interim order not be binding—what difference is made by using the word "provisional"?] It shows that the order is not final, but conditional. [MCTAGUE J.A.: The whole situation seems confused. There is a distinction between a judgment for alimony and an interim order for alimony. The *Meyers* case was a judgment for alimony. Is not your main contention here that this order provides only for interim alimony? As I understand the expert's evidence, he said that this order is provisional as to the future, but that, as to past due payments, it is final for all time. Where is the conflict? ROBERTSON C.J.O.: An interim order is not an adjudication between the parties as to their rights. MCTAGUE J.A.: I have never heard of a case where past due instalments were not a fixed debt.] Arrears of alimony never become a fixed debt. [MCTAGUE J.A.: That is correct in England, but the statute is differently worded.] As to the necessity for finality in the foreign judgment sued on, we also refer to *Harrop v. Harrop*, [1920] 3 K.B. 386.

Because of the large sums of money received by the plaintiff, she would not be entitled to collect arrears of alimony in Quebec under this order: *Durand v. Laroche* (1938), 76 Que. S.C. 231.

The defendant was entitled to proceed here under his counterclaim, but the trial judge said he should have gone to Quebec to do so. The counterclaim impeaches the Quebec judgment and seeks recovery of moneys alleged to have been obtained illegally by virtue of art. 1285 of the Quebec Civil Code. Both parties now live in Ontario, and are entitled to have the counterclaim adjudicated upon here. The judgment for the plaintiff should be set aside, or a new trial should be ordered, at which the defendant would be entitled to submit all his evidence.

F. J. Hughes, K.C., for the plaintiff, respondent: *Maguire v. Maguire* (1921), 50 O.L.R. 100, 64 D.L.R. 180, which has been greatly stressed, is entirely different from this case; there it was clear that the foreign Court had power to alter the terms of the judgment, even as to past due payments. A case which is directly in point is *Wood v. Wood* (1916), 37 O.L.R. 428, 31 D.L.R. 765, where it was held that future payments might be changed, but that past payments were not subject to change. See also *Robertson v. Robertson* (1908), 16 O.L.R. 170; *Swaizie v. Swaizie* (1899), 31 O.R. 324.

The onus is not on the plaintiff to show finality; once a judgment is shown to be regular upon its face, the burden is on the defendant to attack it: *Stolp & Co. v. W. B. Browne & Co.*, 66 O.L.R. 73, [1930] 4 D.L.R. 703.

In *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] 4 D.L.R. 580, it was said that a judgment was final when the real rights of the parties were determined.

As to the counterclaim, if the defendant's contention is right that proceedings are still pending in Quebec, it is difficult to see why the counterclaim should be heard in Ontario. The position taken at the trial was that the defendant had no defence, but that he did have a counterclaim. The question of the finality of the foreign judgment was not raised until after the trial.

G. T. Walsh, K.C., in reply.

Cur. adv. vult.

29th September 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.: An appeal from the judgment of Hogg, J., dated 19th June 1942, on the trial of the action before him at Hamilton without a jury. The judgment awarded the plaintiff

\$2,640 and costs, and dismissed the defendant's counterclaim without costs, and from this the defendant appeals.

The action was brought upon an order or judgment of the Superior Court for the Province of Quebec, made in an alimony action brought by the present plaintiff against the present defendant, whereby the defendant was condemned to pay to the plaintiff a "provisional allowance" of \$165 per month. The order was not one made after a trial of the action, but is similar to the order that, in the practice of this Province, is called an order for payment of "interim alimony", or an order for payment of alimony *pendente lite*.

The present action was commenced on 25th February 1942, by specially endorsed writ issued at Hamilton, claiming "\$1,815. for arrears of alimony pursuant to the judgment of the Superior Court of the Province of Quebec, dated the twenty-third day of April, A.D. 1940", and the particulars endorsed were "Monthly payments of one hundred and sixty-five dollars, commencing March 1st, 1941 to January 30th, 1942, eleven months at \$165.00 —\$1,815.00". An appearance was entered for the defendant by a solicitor, and an affidavit of merits was filed on 5th March 1942. It is said that the defendant's solicitor later filed a "discontinuance"—which apparently is intended to mean a notice that he was no longer acting as the defendant's solicitor; in any event a statement of claim, purporting to be delivered on 7th May 1942, was filed on 8th May 1942, and was served upon the defendant personally on 9th May 1942. No statement of defence was delivered, and thereupon the plaintiff had the pleadings noted closed, and followed that with a notice of trial for the sittings at Hamilton commencing on 1st June 1942. The action was entered for trial accordingly, and was on the list of cases to be tried at the Hamilton sittings in June last.

The plaintiff could hardly have more completely disregarded all the rules of practice that apply to such an action. The action having been commenced, no doubt properly, by a specially endorsed writ, the plaintiff's proper course on default of defence was to sign judgment under Rule 355. A plaintiff is only entitled to note pleadings closed under Rule 121 where there is default in delivering a statement of defence, in a case where judgment cannot be signed. Further, notice of trial was improper. Rule 356 provides that in a case where the plaintiff is not entitled to

sign judgment for default of defence the plaintiff may, after the pleadings have been noted as closed, move for judgment upon the statement of claim. The Rules do not provide for a trial in such a case, and this action was improperly on the list.

The plaintiff having in this wholly irregular way got the action on the list of cases for trial, it first came before the learned trial judge on 10th June 1942, by way of motion by counsel for the defendant. Counsel said that the defendant had not been informed by the solicitor who had entered an appearance for him, of his retirement from the action, and that the defendant was not in a position to defend the action at the present time. Counsel applied for time to file a statement of defence and counterclaim and to prepare for trial. After a somewhat lengthy argument, an order was made that the defendant deliver his defence and counterclaim on or before 13th June, the trial to be held in the following week on one day's notice. A statement of defence and counterclaim was delivered within the time fixed, and the action then came on for trial on 19th June.

The attention of the trial judge was not called to the irregularity of the plaintiff's position before the Court. The defendant's counsel did not attack it then or now, and it may be that, by accepting the terms of the order on the motion to postpone, and, after pleading, by appearing at the trial, the defendant lost any right to object, and, in effect, regularized the plaintiff's position. While this may be so, the summary manner in which the defendant was forced to proceed with the trial in circumstances where the action was not properly on the list of cases for trial, no doubt contributed to bring about what, in the result, was an unsatisfactory trial, and it is a matter to be considered in disposing of this appeal. The Rules of Practice and Procedure are made for the orderly conduct of proceedings in the Court. The solicitors and the officers of the Court are expected to observe these rules, and failure to do so may be expected to end in confusion, of which there is evidence here.

Little evidence was put in at the trial, but there was much discussion before the trial judge as to the issues to be dealt with and the manner of disposing of them. An exemplification of the order of the Quebec Court sued upon was put in. It was conceded that the defendant had not paid any of the monthly sums claimed, although he had paid, or otherwise satisfied, earlier

sums falling due under the order of the Quebec Court. The plaintiff called an advocate practising in the Province of Quebec, who gave evidence of the law of that Province relative to an order such as that sued upon.

It is not disputed that an action upon a foreign judgment to recover money that it orders to be paid, will not lie in this Province if the foreign Court whose judgment is sued upon retains power to vary its judgment in respect of the sums sued for. Such a judgment is not strictly a final judgment. To establish that the foreign judgment is final, "it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties." *Nowvion v. Freeman et al.* (1889), 15 App. Cas. 1 at p. 9, per Lord Herschell.

As has already been stated, the action in the Quebec Court was an alimony action. Apparently the action has not yet been tried, although begun more than two years ago. The order does not adjudicate in any sense upon the plaintiff's claim for alimony. That claim is yet to be established. The basis of the order sued upon is of this nature—the parties are husband and wife, and are living apart; the wife being in need of sustenance while the action is pending, applied to the Court in that action for an alimentary allowance, and the Court, under an appropriate section of the Civil Code of Quebec, thereupon made the order for the payment by the husband of "a provisional allowance of \$165.00 per month," expressly "reserving to Defendant the right to apply for a reduction of said alimentary allowance."

The appellant's submission is that this is not a final order; that it is not an adjudication upon any right of the respondent, nor does it vest any right in her; that it is merely a provisional allowance made in the exercise of a discretionary power vested in the Court, for her maintenance until the Court can, in due course, decide upon her claim, and make such final order as is proper. In the meantime, according to the appellant's contention, the matter of the provisional allowance is wholly under the control of the Court, and is subject to its further order.

The respondent does not dispute that the Court may, by further order, affect the allowance so far as monthly sums yet to accrue due are concerned, but as to monthly sums already

accrued due under the order the respondent submits that they constitute a debt due by the appellant to the respondent, that the Court making the order cannot interfere with. To this extent, the respondent submits that the order is a final order.

The witness called by the respondent to give evidence as to the law of Quebec supported the contention of respondent. The question is one to be determined by the law of Quebec, and what the law of Quebec is may be proved in that manner. Without reflecting in the least upon either the learning or the integrity of the witness, I do not think this important question can be satisfactorily determined upon the evidence presented to the trial judge, and now before us. The witness cited no judicial authority for his statements as to the law of Quebec, nor were the provisions of the Civil Code relative to the matter produced or cited. Substantially, all that the evidence amounts to is that this gentleman, an advocate versed in the laws of Quebec, entertains the opinions he expressed in regard to the law of Quebec on this matter. It does not appear whether the witness has had experience in litigation of the kind in question here, other than this, that he was engaged for the respondent in her litigation in Quebec with the appellant, and that he personally appeared for her on the motion for the order sued upon.

Many cases were cited on the argument of the appeal, bearing upon the right to sue in this Province upon the judgments of various foreign Courts. Many, if not all of them, were judgments in alimony actions, but with one exception no case was cited where the judgment or order was for payment *pendente lite*. The one exception is *Bailey v. Bailey* (1884), 13 Q.B.D. 855. None of these cases is of any real assistance on the question here for it is to be determined by the law of the Province of Quebec. This much may perhaps be said safely, that the question whether or not such an order as is sued upon here is a final order in the sense and to the limited extent that the respondent contends, may not depend altogether, nor chiefly, upon the terms in which it is expressed. The nature of the jurisdiction in the exercise of which the order was made would seem to be of fundamental importance. Does the Court, in making the order, which is not based upon a determination of any right of the plaintiff, but is made *pendente lite* for convenience, retain in the action such control over its own order

that it may make such further order in relation to it as may to the Court seem just, either in the course of the litigation or on the final adjudication?

There was but little cross-examination of the witness by counsel for the appellant. No doubt, coming into the matter at so late a stage, the appellant's counsel at the trial had no adequate opportunity to prepare on a question of the law of another Province. This may to some degree account for the somewhat superficial manner in which this important, and by no means simple, question was dealt with in evidence.

Having in mind the importance of acting only upon satisfactory and adequate proof of the law of the Province of Quebec relative to the matter in question here, and the abrupt and somewhat irregular manner in which the appellant was forced on to trial when plainly unprepared, I am of the opinion that a new trial should be had, and that, in the exercise of our judicial discretion, we should so order.

In another respect the judgment at the trial is not entirely satisfactory. The defendant set up a counterclaim, alleging that the plaintiff had improperly received money of his, and had failed to account for it. It is by no means clear from the record what understanding (if any) was arrived at as to the disposition of the counterclaim. The judgment dismissed the counterclaim. Counsel for the respondent on this appeal concedes that it should not have been dismissed. His contention appears to be that it was agreed that the counterclaim should be disposed of by the Court of the Province of Quebec, as it largely turns upon questions of Quebec law. It may be that that is a correct statement of what was done, although it is not by any means clear upon the record. The judgment should, in any case, be amended to properly safeguard the appellant's rights in respect of the matters set up by way of counterclaim in this action. They have not been adjudicated upon here.

Attention should also be directed to the fact that the judgment appealed from directed the payment of instalments of interim alimony that had not accrued due when the action was commenced. In her statement of claim the respondent added to the claim endorsed on the writ a further claim for instalments of alimony to accrue due under the order, until judgment. No complaint was made either at the trial or on the appeal in regard to this, but we direct attention to it.

As to costs, the respondent should have the costs of the former trial in any event, as she is not in any way chargeable with the failure of the appellant to plead and to properly instruct counsel. The costs of the appeal should be costs in the cause to the successful party.

New trial ordered.

Solicitor for the plaintiff, respondent: Harry F. Hazell, Hamilton.

Solicitor for the defendant, appellant: T. R. Sloan, Hamilton.

[COURT OF APPEAL.]

**Re Township of York By-law 11996;
Grimshaw Bros. Limited et al. v. The Township of York.**

Justices and Magistrates—Disqualification from Bias—Presuming Bias from Financial Interest—Whether Interest of Taxpayer Sufficient—Rule of Disqualification Not to be Extended to Administrative Official—Referee under The Township of York Act, 1935 (Ont.), c. 100, s. 7.

The rule that no person who is not capable of acting judicially, because of bias, financial or otherwise, shall take part in judicial proceedings, as laid down in such cases as *Frome United Breweries Company, Limited et al. v. Bath Justices*, [1926] A.C. 586, and *Dimes v. Proprietors of the Grand Junction Canal et al.* (1852), 3 H.L. Cas. 759 at 793, 10 E.R. 301, should not be extended to officials exercising purely administrative, as distinct from judicial, functions. A referee appointed under s. 7 of The Township of York Act, 1935 (Ont.), c. 100, to value and adjust rights and claims between various parts of the municipality made into one sewer area, has no judicial functions; his duty is merely to inquire into the circumstances and to report to the Ontario Municipal Board, which makes an order, but is in no way bound by the referee's report. Such a referee is therefore not disqualified by the fact that he is a ratepayer in one of the affected parts of the municipality. *Reg. v. Huggins et al.*, [1895] 1 Q.B. 563; *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*, [1931] A.C. 275; *Toronto Corporation v. York Corporation*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452, applied.

Per Fisher J.A.: Even if the rule were applicable to such a referee, a mere interest as a ratepayer is not such a financial interest as to disqualify. *Rex v. Justices of Sunderland*, [1901] 2 K.B. 357 at 371; *Rex v. London Justices; Ex parte South Metropolitan Gas Company*, [1907] W.N. 200, applied.

A SPECIAL case stated for the opinion of the Court of Appeal by the Ontario Municipal Board, pursuant to s. 101 of The Ontario Municipal Board Act, R.S.O. 1937, c. 60.

The following statement of facts is taken from the judgment of FISHER J.A.:

“This is a stated case submitted by the Ontario Municipal Board to and for the opinion of the Court, and it arises from and under an Act Respecting the Township of York, 1935 (Ont.), c. 100. Under s. 4 of that Act, permission is given to the Corporation of the Township of York to pass a by-law amalgamating two sewer areas located in the township into one sewer area. By-law 11996 was passed on 14th February 1941, amalgamating into one sewer area, sewer areas 1 and 2. Subs. 1 of s. 7 provides for the appointment of a referee to value and adjust all rights and claims between the respective parts of the said township made into a sewer area. The Board appointed Kenneth B. Maclaren, K.C., to act as referee. Subs. 3 of s. 7 provides that the referee is to proceed, to report upon the rights and claims of the ratepayers in these two areas, and, after he has made his report, to file it with the Ontario Municipal Board. Subs. 4 of s. 7 provides that the Board, upon receipt of the report, shall ‘take the same into its consideration, and may hear such representations in respect thereto as it may see fit, and before adopting any such report the said board may remit the same to the referee for his further consideration.’ Subs. 5 of s. 7 provides that the Board may ‘adopt, vary or amend the report of any referee appointed under this section, and the order of the said board adopting such report or varying or amending the same shall be final and conclusive and not open to question or appeal, and the terms thereof shall be binding upon the said corporation and the ratepayers thereof or of any area affected thereby,’ and subs. 6 of s. 7 provides that the council of the Corporation ‘shall impose and levy annually such special rates against the lands assessable therefor as may be directed in any order of the said board for the purpose of adjusting the said rights and claims.’

“After giving notice, by publication, to the ratepayers, the referee heard evidence of interested parties and made and filed his report with the Board. When the report came up for consideration, objection was taken, for the first time, to the legal status of the referee, by counsel representing the applicants, who urged that the referee was disqualified from acting because, he being a ratepayer in sewer area No. 1, and thereby having a pecuniary interest, there arose a reasonable apprehension of

bias. The Board thereupon stated the following case for the opinion of the Court:

“‘1. Is Kenneth B. Maclaren, Esq., K.C., disqualified from acting as Referee under the Township of York Act, 1935, c. 100, in respect of By-law No. 11996 by reason of the facts that he is the owner of property in and is assessed and pays taxes in Sewer Area No. 1 in the Township of York, and is financially affected as a ratepayer by the proposed amalgamation of Sewer Areas Nos. 1 and 2?

“‘2. Must the Board reject the Report made by Kenneth B. Maclaren, Esq., K.C., purporting to act as such Referee as not having been made by a person properly qualified to act as Referee?

“‘3. If the answer to question 2 is in the affirmative can the Board make a valid order valuing, adjusting, and determining all rights and claims between the respective parts of the Township made into one Sewer area in the absence of a Report by a duly appointed and qualified Referee?

“‘4. If the answer to question 3 is in the negative can the Board appoint a new Referee to value, adjust and determine in an equitable manner all rights and claims between the respective parts of the Township made into one sewer area under the provisions of the said By-law No. 11996?’ ”

14th September 1942. The stated case was argued before RIDDELL, FISHER and GILLANDERS JJ.A.

H. E. Manning, K.C., for the applicants: The case turns upon the meaning of s. 7(1) of The Township of York Act, 1935 (Ont.), c. 100, and particularly the words “All rights and claims between the respective parts of the said township made into one sewer . . . area under the authority of this Act shall be valued, adjusted and determined in an equitable manner by a referee”. We contend that Maclaren cannot be referee because he is financially interested. If there is a pecuniary interest on the part of the referee, the disqualification is absolute, and the law presumes bias: *Dimes v. Proprietors of the Grand Junction Canal et al.* (1852), 3 H.L. Cas. 759 at 793, 10 E.R. 301; *Rex v. Justices of Sunderland*, [1901] 2 K.B. 357 at 364, 366, 371. [FISHER J.A.: What would Maclaren’s taxes amount to in a year? Is not the point that in all the circumstances there is a probability of bias if the referee is pecuniarily interested in this one

small piece of property?] Precisely, and in further support I refer to *Reg. v. Gaisford et al.* (1891), 66 L.T. 24; *Reg. v. Recorder of Cambridge* (1851), 8 El. & Bl. 637, 120 E.R. 238; *Frome United Breweries Company, Limited et al. v. Bath Justices*, [1926] A.C. 586 at 590, 591, 602, and *Reg. v. Steele* (1895), 26 O.R. 540 at 542, 2 C.C.C. 433.

On these authorities, it is submitted that the report must be rejected. If this is done, the Board cannot make an order, not having before it the report of a competent and duly qualified referee: subss. 4, 5 and 7 of s. 7. Nor can it appoint a new referee, because the appointment must be made within three months after the passing of the by-law: subss. 1, 3.

Howard A. Hall, K.C., for the respondent: Maclaren was not acting in a judicial capacity. His interest was only that of a taxpayer, in common with all other ratepayers, and this alone would not be sufficient to disqualify him: *Ex parte Hebert* (1898), 34 N.B.R. 455, 4 C.C.C. 153; *Reg. v. Dublin Justices*, [1894] 2 Ir. R. 527 at 533; *Rex v. London Justices*; *Ex parte South Metropolitan Gas Company*, [1907] W.N. 200.

Maclaren's duties had no resemblance to the functions of a magistrate. He had only to decide what was a fair and equitable adjustment, and it is explained in *Reg. v. Huggins et al.*, [1895] 1 Q.B. 563 at 565, that there is a distinction in these cases. He was to report to an administrative body, which would sift the facts. He made no final decision, but was authorized only to make a report to the Board.

A judge is not disqualified from hearing assessment appeals, or claims for non-repair of highways, because he happens to reside in the municipality affected; why should such a disqualification be applied in the case of a referee? In any event, the applicants waived any objection by appearing before the referee, whom they knew to be a ratepayer.

H. E. Manning, K.C., in reply.

Cur. adv. vult.

10th October 1942. RIDDELL J.A.:—This somewhat unusual application to us has no dispute as to the facts—a declaration is asked on a simple point of law.

The Township of York, exercising the powers conferred by the Act of the Ontario Legislature of 1935, c. 100, considered a change in its sewer system; to that end, the Council obtained

the appointment under s. 7 of the Act by the Ontario Municipal Board of a referee to value, adjust, and determine "in an equitable manner . . . All rights and claims between the respective parts of the said township"

The change proposed would necessitate a change in the tax to be paid by the taxpayer of any of the parts into which the township was divided.

The Board appointed a taxpayer of one of the districts to be affected by the by-law, to be such referee. He heard parties on a formal hearing and made a report of his conclusions. Were his report of any legal effect in itself, I should not hesitate to hold that it should not be acted upon—that he had a clear financial interest in the measure to be passed—were the Township or the Municipal Board in any way bound to accept and act on his conclusions, I think that we should be compelled to declare his appointment and report wholly void of legal effect. No authority is necessary for such a decision. But his report has no legal effect—the Council, the Board, may disapprove. In other words, his report is much like prejudiced evidence, not an adjudication.

I would hold that there is nothing illegal in the matter. It is not a case for costs.

FISHER J.A. [after setting out the facts as above]: There are no serious questions of fact in dispute, and our first inquiry has to do with the determination of the legal status of the referee. On this point we had able arguments from both counsel, including the citation of many cases in support of their respective contentions. Briefly, Mr. Manning argued that the referee was acting in the character of a magistrate, and therefore in a judicial capacity, and that, being interested as a ratepayer in sewer area no. 1, he was disqualified because of a presumption of bias. On the other hand, Mr. Hall contended that the referee's duties were purely administrative, and in any event that the interest of a ratepayer, as one of a community, did not constitute a pecuniary interest.

It was stated on the argument that the matter of merging these two areas into one was brought to the attention of the Township of York by the Department of Municipal Affairs, and that it was the Minister who asked the Township to pass the by-law; that the appointment of a referee was for the purpose of valuing and making adjustments in order to prevent inequali-

ties when it came to the assessment of those ratepayers affected by this merger. In this connection we were also told that sewer areas 1 and 2 comprised a very large part of the township, with a population of about 70,000.

I am of opinion, after a careful consideration of the facts and law, that questions 1 and 2 should be answered in the negative. In the view I take, the duties of this referee were purely administrative and not judicial. The referee was not called upon, judicially, to determine rights between individuals or between individuals and a municipality. All that this statute ever authorized the referee to do was to value, adjust and report to the Board. He had no power even to recommend the imposition of rates as the result of his valuations, and further he had no power to determine anything that would have a binding effect upon anyone or anything, for the reason that his report was always subject, under subss. 4 and 5, *supra*, to be finally dealt with by the Board. Under these circumstances I find it impossible to hold that the referee was acting otherwise than in an administrative capacity. It seems to me that the duties of the referee come very close to the duties of a township assessor, appointed, as he is, to value property for assessment purposes, and surely it could not be successfully contended that assessors would be acting judicially, and would be disqualified because of a presumption of bias, if it was found that they happened to be ratepayers, and, as such, financially interested. It is well known that there is no finality about the values placed by assessors, and that if any dispute arose it would be finally dealt with by a Court of Revision, and equally, in the present case, the report of the referee was to be finally dealt with by the Municipal Board.

With respect, I think that Mr. Manning, in the view he has taken in the present case, has failed to distinguish between cases in which the decisions attacked were those of a regular judicial tribunal and those in which they were decisions of an administrative rather than a judicial tribunal. The referee in this case acted without taking an oath of office, as a magistrate or judge would be obliged to do, and also heard parties who were not sworn in the ordinary way as witnesses. I have difficulty in these circumstances in holding that this referee was acting judicially.

I am also of opinion that the interest of a taxpayer alone as one of the community in this large area did not constitute him one having such a *pecuniary interest* as to disqualify him on the ground of bias. To hold otherwise would open up a serious question as to the legal right of judges sitting upon assessment appeals when residents and ratepayers in a municipality and, coming closer, as to the members of a Municipal Board having many cases involving a municipality in which they too were resident ratepayers. It was specifically held by the Privy Council in *Toronto Corporation v. York Corporation*, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452, that the Ontario Municipal Board was an administrative body, and that to the extent that The Ontario Municipal Board Act, R.S.O. 1937, c. 60, conferred judicial powers upon the Board, it was *ultra vires*. It seems to me, therefore, that if the referee in the present case was acting in a judicial capacity, the Municipal Board would be acting in that capacity. I agree with counsel for the respondent that the interests of a taxpayer as such do not constitute a pecuniary interest. This conclusion is, I think, amply supported by the two cases to which I now refer:

In *Rex v. Justices of Sunderland*, [1901] 2 K.B. 357, Vaughan Williams L.J. said, at p. 371:

“A bias is presumed from the mere fact of the existence of the interest. This is not a case of that kind. The utmost that could be said here is that the justices in question had a pecuniary interest as trustees for the ratepayers.” That is, that while they were ratepayers and members of the council, they were trustees for those ratepayers.

In *Rex v. London Justices; Ex parte South Metropolitan Gas Company*, [1907] W.N. 200, one of the justices forming the Court was the chairman of the Holborn Assessment Committee, and the question was whether, upon that ground, he had an interest, or there was a possibility of bias on his part which disqualified him from being a member of the Court of Quarter Sessions of the County of London, which heard the appeals. The Court held that the interest of a taxpayer for this purpose was not a pecuniary interest; that it was too remote.

For these reasons I am of opinion that the referee is not disqualified from acting.

This is not a case for costs.

GILLANDERS J.A.: The facts are fully set out in the judgment of my brother Fisher, with whose conclusion I am in agreement, and need not be repeated.

The principle which counsel for the applicants in his able argument submits should be applied is authoritatively stated in the judgment of Viscount Cave L.C., in *Frome United Breweries Company, Limited v. Bath Justices*, [1926] A.C. 586, at 590:

“My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal.”

In *Dimes v. Proprietors of the Grand Junction Canal et al.* (1852), 3 H.L. Cas. 759, 10 E.R. 301, Lord Campbell says in part, at page 793:

“ . . . it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.”

This principle has been applied in many cases.

We are referred to *Rex v. Justices of Sunderland*, [1901] 2 K.B. 357. The point decided in that case was not the exact point here in question. Certain justices of a borough who were also members of the borough council, had taken an active part in the council in connection with certain matters respecting the granting of licences. The same justices subsequently sat on the hearing of an application for the licences in question, and it was held that there was a real likelihood of bias on the part of these justices in regard to the subject matter of the application by reason of the part they had previously taken, as members of the council, in the negotiations respecting the licences in question. At p. 371, Vaughan Williams L.J. says in part:

“It appears to me that the whole law on the subject may really be found laid down in the cases of *Reg. v. Rand et al.* (1866), L.R. 1 Q.B. 230, and *Reg. v. Meyer et al.* (1875), 1 Q.B. 173. When is it, according to those decisions, that a judge or a justice is disqualified from sitting on the ground of bias? If he has personally a pecuniary interest or an interest capable of

being measured pecuniarily, the law raises a conclusive presumption of bias. For reasons of policy, which hardly require explanation, it is not thought convenient, where there is such an interest, to go into the question whether he in fact acted partially or impartially. A bias is presumed from the mere fact of the existence of the interest."

In *Reg. v. Gaisford* (1891), 66 L.T. 24, a magistrate at a meeting of ratepayers had moved a resolution calling upon the appellant to remove a heap of earth. This not having been done, a summons was taken out against the appellant by a surveyor of highways, and the magistrate in question sat with another on the hearing of this charge. The order of the magistrate was set aside both on the ground that the magistrate had taken part in the originating proceedings and also because he had a pecuniary interest in the matter as a ratepayer. Smith J. said:

"I am also of opinion that the magistrate was interested pecuniarily in the matter before him, inasmuch as he was a ratepayer in the parish on which the costs of the proceedings if unsuccessful would fall, and though such pecuniary interest may, it is true, have been almost infinitesimal, yet I am of opinion that it would indicate sufficient interest on his part to disqualify him from taking part, in his judicial capacity, in the hearing of the summons."

The same principle is applied in *Reg. v. Recorder of Cambridge* (1857), 8 El. & Bl. 637, 120 E.R. 238.

It is submitted that in the case at bar, the duty of the referee was administrative and not judicial and that different considerations should be applied.

In *Reg. v. Huggins et al.*, [1895] 1 Q.B. 563, at 565, Wills J. says:

"In these cases there is always a certain degree of difficulty, owing to the confusion which has arisen from a failure to clearly distinguish between the different classes of cases in which decisions have been quashed upon certiorari on the ground of the improper constitution of the tribunals which gave them, namely, cases in which one of the tribunal had a pecuniary interest, cases in which, though having no pecuniary interest, he nevertheless had a bias, and cases in which he filled the part of prosecutor as well as judge; and also from a failure further to distinguish between cases in which the decisions impugned were those of regular judicial tribunals, and those in which they were the deci-

sions of an administrative rather than of a judicial body, but were nevertheless opposed to ordinary notions of justice. The principles which are applicable to these several classes of cases are not in all respects identical."

And Wright J. says, at p. 565, supporting the opinion of Wills J.:

"Some of the cases in which the Court has been asked to interfere are cases of decisions by administrative bodies, such as the London County Council and others. They are very different from cases of decisions by judicial tribunals. In my judgment, the Court ought to be slow to interfere in the former, but in the latter ought to interfere on much slighter grounds."

It becomes important, I think, to consider whether the referee in this case was exercising functions which were judicial or administrative.

In *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*, [1931] A.C. 275, Lord Sankey L.C., at p. 295, says:

"What is 'judicial power'? Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in *Huddart, Parker & Co. v. Moorehead*, 8 C.L.R. 330, 357, where he says: 'I am of opinion that the words "judicial power" as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.' "

While the Lord Chancellor was there considering a question under the Australian Constitution, the discussion in that case is helpful. The above case and the quotation set out are referred to by Rowell C.J.O. in *Re City of Toronto and Township of York*, [1937] O.R. 177, at 185 and 186, 46 C.R.C. 55, [1937] 1 D.L.R. 175.

That case involved the question as to whether the Ontario Municipal Board was a judicial or administrative tribunal and the nature of the duties which that Board was there purporting to carry out. It was held in this Court that, while an Act of the Provincial Legislature purporting to give the Board power to settle differences between the parties to an agreement "as to

the construction thereof, or as to any matters relating to or arising out of the agreement" was *ultra vires*, since it purported to confer judicial functions rather than administrative duties, yet this provision was severable from other clauses empowering the Board to vary and fix rates to be charged for water supply under the agreement, and that these latter clauses were *intra vires* since they conferred purely administrative duties on the Board. The late Chief Justice, at p. 180, says in part:

" . . . fixing the rates to be charged for water under such an agreement is a purely administrative function" An appeal to the Privy Council was dismissed, [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452.

Mr. Manning draws our attention to what is said in *Frome United Breweries v. Bath Justices*, *supra*, by Viscount Cave L.C., at p. 590, where, referring to the rule that a person subject to bias could not even sit on a tribunal:

"This rule has been asserted not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others."

And at page 591:

"The Bath justices, when sitting as the compensation authority under the Licensing Act of 1910, may not be a court; but they are performing a judicial act, for it is their duty after hearing evidence and listening to arguments to pronounce a decision which may vitally affect the interests of the persons appearing before them. This being so, the justices who are members of the authority are bound to act judicially and not to sit if they are subject to that which in *Reg. v. Rand et al.* (1866), L.R. 1 Q.B. 230, was referred to by Blackburn J. as a 'real likelihood of bias'; and I cannot doubt that in the case of those three justices who took part in instructing a solicitor to oppose the renewal of the licence of the Seven Dials, such a real likelihood of bias existed."

And the words of Lord Atkinson in the same case at p. 602:

"One of the best definitions of a judicial act as distinguished from an administrative act is that given by the late May C.J. in the Irish case of *Reg. (John M'Evoy) v. Dublin Corporation* (1878), 2 L.R. Ir. 371, 376. There, though the borough fund of the corporation was otherwise sufficient for all legitimate purposes, it was rendered insufficient by reason of illegal payments

having been made out of it, and other sums having been improperly charged upon it. The corporation levied a borough rate to make up the deficiency. It was held, upon an application for a certiorari, that the rate was illegal and that all orders and resolutions of the corporation imposing it, and the precepts to the Collector-General to levy it, should be quashed. May C.J. said: 'It has been contended in this case that no certiorari can issue to remove the borough-rate, and this point must be first considered. It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term "judicial" does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts.' "

There may be some difficulty in reconciling all that is said in the statement adopted by Lord Atkinson with all that was said in the more recent *Toronto v. York* case, *supra*. However, in any view, I think that what was done by the referee in the case at bar falls short of being a judicial act and should be viewed as the performance of an administrative function. By s. 7 of The Township of York Act, the referee, after a hearing, is required to make a report in which all rights and claims between the respective parts of the township are valued, adjusted and determined in an equitable manner. This report is made to the Municipal Board, and the Board is then to take this report into consideration; it may hear representations in respect thereto, may remit it to the referee for further consideration and finally may, by order, adopt, vary or amend the report. There is nothing final or decisive, even subject to appeal, about the referee's report; it does not impose any liability on anyone. Furthermore, this report is made to a body which "is primarily, in 'pith and substance', an administrative body," to use the words of Lord Atkin in *Toronto v. York*, *supra*.

It is not urged here that there is a real likelihood of bias, but that because of the referee's interest as a ratepayer in one of the areas, bias must be presumed. The principle as it has been applied is a salutary one and should not be relaxed in judicial proceedings.

It is unnecessary to consider here what effect should be given to the facts of this case if the acts of the referee were judicial and performed in the course of judicial proceedings. Being of opinion that they are administrative in character, and in view of the fact that it is not suggested that the referee had taken part in the proceedings or in fact had any interest other than as a ratepayer in a modest way in one of the areas, I agree with my brethren that in the circumstances he was not disqualified from acting.

The first and second questions asked of this Court in the stated case should be answered in the negative. In this view it is unnecessary to answer the other questions.

I agree that this is not a case for costs.

Questions 1 and 2 answered in the negative; questions 3 and 4 not answered; no order as to costs.

Solicitors for the applicants: Manning & Babcock, Toronto.

Solicitor for the respondent: Howard A. Hall, Toronto.

[HOPE J.]

The Attorney-General of Canada v. The City of Toronto.

Criminal Law—Disposition of Fines and Penalties—Prosecution Conducted by, and at Expense of, Dominion Government—The Criminal Code, R.S.C. 1927, c. 36, s. 1036.

The words "cost of prosecution" in s. 1036(1)(b) of The Criminal Code, R.S.C. 1927, c. 36, have a more restricted meaning than the words "expense of administering the law" in the proviso to that subsection. The term "costs of prosecution" has acquired a definite legislative meaning, as is instanced by its use in ss. 1044, 1047, and 1081(3), and it must be read as applying to the costs peculiar to particular criminal proceedings, as distinguished from what may be referred to as the "overhead" costs of legal machinery. Where a prosecution is instituted by the Dominion Government, and is conducted by counsel appointed by that Government (even if his appointment is confirmed by the Provincial Government), without the participation of any Provincial law officer, there can be no doubt that the Dominion is entitled to the fines imposed. *Attorney-General of Nova Scotia v. Attorney-General of Canada (Fines Reference)*, [1937] S.C.R. 403, 68 C.C.C. 177, [1937] 3 D.L.R. 225; *The King v. Attorney-General for Ontario*, [1934] Ex. C.R. 25, 61 C.C.C. 359, [1934] 3 D.L.R. 483, applied.

It cannot be argued that the words "fines . . . first mentioned in this section" in the proviso to s. 1036(1) entitle the municipality to all fines referred to in the preceding part of the subsection, even including those expressly reserved to the Dominion Government by clauses (a) and (b).

Quaere, whether fines imposed for violations of s. 498 of The Criminal Code can be considered as "imposed in respect of the breach of any of the revenue laws of Canada", within the meaning of s. 1036(1)(a).

A TRIAL of two issues directed in the following circumstances:

Several corporations and individuals were convicted at Toronto of offences under s. 498 of The Criminal Code, R.S.C. 1927, c. 36. Fines were imposed, and these fines, with one exception, were paid to the Registrar of the Supreme Court. Both the Dominion Government and the City of Toronto claimed payment of these fines from the Registrar, and, on the Registrar's application, interpleader orders were made, directing the trial of issues to determine the right to payment of these fines. The respective contentions of the parties appear in the judgment now reported.

5th October 1942. The two issues were tried together by HOPE J. without a jury at Toronto.

J. C. McRuer, K.C., and *F. A. Brewin*, for the plaintiff.

F. A. A. Campbell, K.C., and *John Johnston*, for the defendant.

14th October 1942. HOPE J.:—This trial is in pursuance of two orders, each for the trial of an issue to determine who is entitled to certain fines imposed as a result of prosecutions and convictions under s. 498 of The Criminal Code, R.S.C. 1927, c. 36.

No evidence was submitted. All facts in connection with the matter are fully covered by the admissions in the pleadings, supplemented by a statement of admissions signed by counsel for both parties, and filed at the trial. Therefore, in view of the complete agreement as to the facts, it is unnecessary for me to review them in this judgment, other than to state that after an investigation had been held by a Commissioner under The Combines Investigation Act, R.S.C. 1927, c. 26, his report was submitted to the Attorney-General for Ontario for his consideration and for the prosecution of the alleged offenders, should he decide to conduct such prosecution. As disclosed in the correspondence between the Attorney-General for Ontario and the Minister of Justice for the Dominion of Canada, filed as exhibits herein, the Attorney-General for Ontario elected not to prosecute, as the alleged offence had been committed not only in Ontario

but also in other Provinces of Canada, and for the further reason that the cost of prosecution would be excessive. However, the Provincial Attorney-General offered to the Dominion his full co-operation in any prosecution which might be undertaken, and for that purpose authorized the counsel named by the Dominion to act as Crown counsel for the institution and prosecution of the proceedings, but again on the distinct understanding that the Province would not be made liable for any of the costs of prosecution.

The plaintiff claims to be entitled to the fines which were levied, by virtue of the exceptions to the general provisions of s. 1036 of The Criminal Code, R.S.C. 1927, c. 36, as the same are set out in clauses (a) and (b) of subs. 1 thereof. Such part of s. 1036 reads as follows:

"1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except, that

"(a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance; and

"(b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Funds in Canada".

The defendant claims by virtue of the terms of the proviso to subs. 1 of the said s. 1036, as the same was enacted by 1922, c. 16, s. 8, *viz.*:

"Provided, however, that with respect to the province of Ontario the fines, penalties and forfeitures and proceeds of

estreated recognizances first mentioned in this section shall be paid over to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered."

Without, for the moment, considering the effect of the amendment of 1922, I am of the opinion that the facts herein bring this case well within the principles laid down by the judgment of the Supreme Court of Canada in *The Attorney-General of Nova Scotia v. The Attorney-General of Canada*, [1937] S.C.R. 403, 68 C.C.C. 177, [1937] 3 D.L.R. 225 (*sub nom. Re Provincial Treasurer; Re Certain Fines*), in which it was decided that the Crown in the right of the Dominion was entitled to the fines imposed.

So far as the matter of payment of costs of prosecution is concerned, the present cases are even clearer than the last-mentioned case. In the latter case the law officers of the Province had participated in the prosecution. Here no Crown Attorney or other law officer of the Province was associated in any way with the counsel named by the Dominion for the prosecution of the case, whose appointment was confirmed by the Attorney-General for the Province on the distinct understanding that the Province would not be responsible for any costs to him.

It may be stated that the defendant makes no pretence to support its claim to these fines under the provisions of s. 1037 of The Criminal Code.

The proceedings leading to the imposition of all the fines herein were undeniably instituted at the instance of the Government of Canada or a department thereof. Equally emphatic, in my opinion, is the fact that the Government of Canada bears or has borne the full costs of the prosecution of all such proceedings. The term "costs of prosecution" must be read in the sense of being applicable to those costs peculiar to these particular criminal proceedings and not to the more general "costs relative to administering the law". I think it can be conceded that the latter phrase is well recognized as connoting what might be referred to as the "overhead" costs of legal machinery, while the former has a more restrictive sense. The term "costs of prosecution" has acquired a definite legislative meaning as is instanced by its use in s. 1044 of The Criminal Code, under the provisions of which an accused, upon conviction, may be ordered

to pay the costs of prosecution. It is also well recognized in practice as governed by s. 1081 of the Code, read in conjunction with ss. 1044 and 1047, that when such an order for the payment of the costs of prosecution is made, then only the particular and determinable costs incidental to the institution and carrying on of the legal proceedings leading to the conviction and clearly computable by tariff or otherwise are levied upon the person convicted. It can readily be realized how impossible it would be to compute, with the slightest degree of accuracy or fairness, any *pro rata* or equitable share of the general expense of administering the law for the purpose of charging such convicted person with any portion of the general costs of administration.

The statement of the late President of the Exchequer Court of Canada in *The King v. Attorney-General for Ontario*, [1934] Ex. C.R. 25, 61 C.C.C. 359, [1934] 3 D.L.R. 483 at 485, in dealing with this same section, is especially apt, in my opinion, in application to the cases at bar:

“Examining now with some care the statutory provisions which I have mentioned, s. 1036 of the Criminal Code may be reconstructed to read thus: ‘Whenever no other provision is made by any law of Canada, all fines or penalties imposed for the violation of any law, shall, in the Province of Ontario, be paid over to the municipal or local authority bearing in whole or in part the expense of administering the law under which the same was imposed or recovered, except, that, all fines or penalties imposed in respect of the breach of any of the revenue laws of Canada, and all fines or penalties imposed for whatever cause in any proceedings instituted at the instance of the Government of Canada or any department thereof shall belong to His Majesty for the public use of Canada.’ That expresses, accurately and fully I think, the meaning of that section, in so far as this case is concerned.

“The scheme of the section was clearly to divide all fines and penalties recovered into two heads or groups with a different destination for each. The fines, penalties and forfeitures referred to in the first clause of the section, and designated in the last clause of s-s. (1) of s. 1036 as the fines, penalties, etc., ‘first mentioned in this section’ relate generally to any fines or penalties imposed for the violation of any law and are to be paid over, in the province of Ontario, to certain municipal or local authorities, but ‘any law’, by s-ss. (a) and (b) of s. 1, does not

include 'revenue laws' for which another destination is prescribed for any fines or penalties paid thereunder, the latter group being expressly excepted from inclusion in the former group.

"So far, I think that there is no difficulty whatever in ascertaining the purpose and meaning of this section of the Code. Standing by itself, it means that generally fines or penalties imposed for violation of any law shall, in the Province of Ontario be paid over, by the magistrate or officer receiving the same, to a particular municipality or local authority, but there is an exception to this, namely, that if the fine is imposed for breach of the revenue laws of Canada, such as the Excise Act, or for whatever cause in any proceeding instituted at the instance of the Government or of any department thereof, the same belongs to His Majesty for the public uses of Canada. That would seem to be a natural and logical disposition of such matters."

Counsel for the plaintiff ably argued that the plaintiff need not rely upon clause (b) alone, but would also be entitled to the fines under clause (a), viz., that the "fines" were "imposed in respect of the breach of any of the revenue laws of Canada". While it has been recognized in the past that the history and development of the legislation contained in s. 498 of The Criminal Code is concomitant to the tariff laws of the Dominion (*vide Wampole & Co. v. F. E. Karn Co., Limited* (1906), 11 O.L.R. 619 at 628), one might be somewhat hesitant in agreeing with this contention on behalf of the plaintiff, but as in my opinion the plaintiff's position so far as these actions are concerned falls plainly within the terms of clause (b), it is unnecessary for me to give any further consideration to the alternative provision entitling the Crown in the right of the Dominion to the fines imposed.

After careful consideration, I fail to appreciate the force or accuracy of the defendant's contention, viz., that as a result of the proviso to s. 1036(1) enacted by the amendment of 1922, all fines mentioned in the first paragraph of s. 1036, even including those reserved by clauses (a) and (b), pass to that municipality which bears wholly or in part the expenses of administering the law under which the fines were imposed. I can find no repugnancy between the proviso and the purview of the section, such as would nullify the reservations to the Crown contained in the purview of the section in accordance with the well-suggested canons of construction.

It is a well-established cardinal rule of judicial interpretation that "A proviso must be interpreted with reference to the preceding parts of the clause to which it is appended as subordinate to the main clause." Beale's Cardinal Rules of Legal Interpretation, 3rd ed., p. 302.

In *River Wear Commissioners v. Adamson et al.* (1877), 2 App. Cas. 743 at 765, Lord Blackburn, quoting from his own judgment in *Allgood v. Blake* (1873), L.R. 8 Ex. 160, stated:

" . . . the Court must in each case apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will.' My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I think it is correct."

Were the defendant's contention to prevail, the legislative use of the words "first mentioned" in the proviso would indeed be idle and meaningless. Moreover, in advancing its contention, the defendant apparently fails to note the significance of the introductory words of s. 1036, *viz.*, "Whenever *no other* provision is made by *any* law of Canada", and also the fact that by clauses (a) and (b), other provision in a law of Canada in clear and concise terms is made for the disposition of such fines and penalties as are therein set out.

After a careful consideration of the section in question, and the various statutes referred to by counsel, I have no difficulty in reaching the conclusion that the moneys in question in both of these actions, whether now held by the Registrar of this Court or already paid to the Receiver General of Canada, and totalling \$176,000, belong to His Majesty in the right of the Dominion. Therefore there will be an order directing that the same, together with all accrued interest thereon, be paid forthwith to the Minister of Finance for Canada, and that the same form part of the Consolidated Revenue Fund in Canada.

Costs of this action to the plaintiff.

Judgment for plaintiff with costs.

Solicitors for the plaintiff: McRuer, Mason, Cameron & Brewin, Toronto.

Solicitor for the defendant: C. M. Colquhoun, Toronto.

[COURT OF APPEAL.]

General Securities Corporation Limited v. Hynes and Brousseau.

Bills of Sale—Validity—Non-registration—Position of Execution Creditor of Bargainor—Not Entitled to Possession of Goods if No Seizure Made—The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181.

There is nothing in The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, to entitle an execution creditor of the bargainor, even if the bill of sale is "null and void" as against him, to possession of the goods referred to therein. His only right as an execution creditor is to have the goods seized by the sheriff and sold under the execution, and the Act merely removes, as an obstacle, the bill of sale which it declares to be null and void. As between the bargainor and the bargainee, there is no question that the latter is entitled to possession, and an execution creditor who has not seized the goods has no right to withhold possession of them from the bargainee.

AN appeal by the plaintiff from the judgment of Hogg J., [1942] O.R. 402, [1942] 3 D.L.R. 476. The facts are fully stated in the report of the trial judgment, and in the judgment now reported.

5th October 1942. The appeal was heard by ROBERTSON C.J.O. and McTAGUE and GILLANDERS JJ.A.

James Cowan, K.C., for the plaintiff, appellant.

H. A. Coon, for the defendants, respondents.

At the conclusion of the argument, the Court delivered judgment orally, allowing the appeal with costs and directing judgment for the plaintiff. Written reasons were subsequently (on 14th October 1942) delivered as follows by

ROBERTSON C.J.O.:—This is an appeal from the judgment of Hogg J., dated 2nd June 1942, after the trial of the action before him at Cochrane without a jury. The action is for possession of certain goods situated upon the mining property at South Porcupine, formerly belonging to Davidson Consolidated Gold Mines Limited, and now owned by the respondent Brousseau. The learned trial judge dismissed the action with costs. The goods in question were at one time the property of the Davidson company. Appellant acquired title to certain of the goods in February 1930 by bill of sale from La Rose-Rouyn Mines Limited, the latter company having been the purchaser of the goods a short time before at a sale by the sheriff under execution against the goods of the Davidson company. Appellant acquired title to the remainder of the goods in April 1930 under bill of sale direct to it from the Davidson company. The goods all remained

on the mining property of the Davidson company, except such as were sold from time to time by appellant.

Neither bill of sale was registered, and the trial judge held that there was no actual and continued change of possession of the goods after the bills of sale were given. He held that under The Bills of Sale and Chattel Mortgage Act, R.S.O. 1937, c. 181, both bills of sale were void as against the respondent Hynes, who is an execution creditor of the Davidson company. He dismissed the action upon that ground. The respondent Brousseau had made common cause with the respondent Hynes in the statement of defence. At the trial he endeavoured to introduce a new defence, that the goods in question are fixtures and as such passed to him when he bought the mining lands. This, the trial judge did not permit him to do, no such ground of defence having been pleaded.

With great respect, I am of opinion that the learned trial judge was in error as to the operation of The Bills of Sale and Chattel Mortgage Act in the case of an execution creditor. Assuming for the moment that both bills of sale here in question are, under the provisions of the Act, "null and void" as against Hynes in his character as an execution creditor of the Davidson company, The Bills of Sale and Chattel Mortgage Act does not operate in any way to give such an execution creditor a right to possession of the goods. An execution creditor has no right as such to take or hold possession even of goods that admittedly are his debtor's. His right is to have the sheriff seize them and proceed to realize upon them under execution. That is, at the most, all that the respondent Hynes could have done, even if he is right in all other respects. The Bills of Sale and Chattel Mortgage Act does not do more than remove, as an obstacle to the execution creditor, the bill of sale it declares to be null and void. It does not vest in him any rights in respect of the goods, other than such rights as he would have had if the bill of sale had never existed.

As between the execution debtor—the Davidson company—and the appellant, there is no question that the appellant is entitled to possession of the goods in question. The respondents were, therefore, wrong in refusing the appellant's demand for possession, and the appellant is entitled to judgment for possession, and to damages for wrongful detention.

Before this action was commenced the sheriff had seized the goods now in question under the execution against the goods of the Davidson company placed in his hands by the respondent Hynes. Upon the appellant claiming the goods, the sheriff abandoned the seizure. So far as appears, there is nothing in this to prevent Hynes having the sheriff make another seizure under the execution, and then proceeding, if so advised, to contest any claim the appellant may make to the goods. That right should still be preserved to him.

The difficulties in the way of the respondent Hynes are not confined, however, to the question of the right of possession. Some part, and we were informed, the major part, of the goods now in question, are goods that were sold under execution against the Davidson company by the sheriff in February 1930 to La Rose-Rouyn Mines Limited, and were, by that company, transferred to the appellant. I fail to see upon what principle an execution creditor of the Davidson company can attack the appellant's title under the provisions of The Bills of Sale and Chattel Mortgage Act. The Davidson company was not the vendor of the goods. It made no bill of sale. I am unable to see how the statute can, for any purpose, be relied upon by the respondents so far as these goods are concerned. Whether there are other grounds for attacking the appellant's title is something with which we have no concern, as it is not on this record.

The appellant is entitled to judgment for possession, to damages, which we have fixed at \$125, and to costs both of the action and of the appeal.

Appeal allowed and judgment directed for plaintiff.

Solicitors for the plaintiff, appellant: Caldbick & Yates, Timmins.

Solicitor for the defendants, respondents: H. A. Coon, Toronto.

[HOGG J.]

[COURT OF APPEAL.]

Re Solicitor; Re Williams v. Swan and Gray Coach Lines, Limited.

Mistake—Unilateral Mistake of Fact—Settlement of Action—Plaintiff Subsequently Learning that Injuries Greater than Anticipated.

The settlement of an action claiming damages for personal injuries cannot be set aside on the ground that the plaintiff, after the settlement and the drawing up of a formal order dismissing the action in accordance therewith, but before the entry of this order, has learned that his injuries are greater than was thought at the time of the settlement, *e.g.*, that he suffers from a permanent disability of which he was then unaware, unless there is evidence of a most convincing character that injustice and hardship will otherwise ensue. *Goddard v. Jeffreys* (1881), 51 L.J. Ch. 57, 30 W.R. 269; *Tamplin v. James* (1880), 15 Ch. D. 215, applied. Further, where such a settlement has been made by a solicitor on the instructions of the plaintiff, the client cannot repudiate it unless he moves at the first reasonable opportunity, and at least before a consent order has been drawn and consented to. *Shepherd v. Robinson*, [1919] 1 K.B. 474; *Little v. Spreadbury*, [1910] 2 K.B. 658, applied.

Actions—Settlement of Claim for Personal Injuries—Term that Action to be Brought and Settled—Whether Contempt of Court.

A collision took place between a motor bus and an automobile driven by S. W., a passenger in the bus, was injured, as were S. and his passengers. Claims were made against the bus company by all the injured persons. W., through a solicitor, made a settlement with the company, under which she agreed to accept a stipulated sum of money in full satisfaction of her claim, and to bring an action against both the company and S., which she would then settle with the company on receiving the agreed amount. *Held*, this settlement, and the action brought in consequence thereof, did not constitute a contempt of court, since there was a real issue between the two defendants, which could conveniently be litigated in such an action, and there was no deception practised upon the Court. *Coxe and Phillips* (1736), Cas. t. Hardwicke (Lee) 237, 95 E.R. 152; *Re Elsam* (1824), 3 B. & C. 597, 107 E.R. 855; *M'Gregor v. Barrett* (1848), 6 C.B. 262, 136 E.R. 1251, distinguished.

Solicitors—Authority—Settlement of Action—Whether Client Entitled to Repudiate Settlement Made on Instructions—Change of Solicitors—Jurisdiction of Court.

Where a solicitor, on instructions from his client, settled an action in the circumstances outlined in the preceding paragraph, and a formal order was drawn up, and consented to, dismissing the action, but the client filed a notice of change of solicitors and attempted to repudiate the settlement, *held*, the repudiation could not be permitted, and the Court had jurisdiction, although no charges were made of dishonourable or discreditable conduct on the part of the solicitor, to compel him, at the instance of the bus company, to carry out his undertaking to have the action dismissed, by entering the order. *United Mining and Finance Corporation, Limited v. Becher*, [1910] 2 K.B. 296; *Re Solicitor* (1916), 37 O.L.R. 310, 31 D.L.R. 86, applied.

A MOTION, on behalf of Gray Coach Lines, Limited, to compel one M., a solicitor, to carry out an undertaking given by him. The facts are fully stated in the judgment.

15th May 1942. The motion was heard by HOGG J. in Chambers at Toronto.

G. W. Mason, K.C., for Gray Coach Lines, Limited, applicant.

J. R. Cartwright, K.C., for Mrs. H. Hepzibah Williams, *contra*.

A. A. Macdonald, K.C., for M., the solicitor.

24th October 1942. HOGG J.—This is a motion made on behalf of Gray Coach Lines, Limited, for an order directing M. to complete an undertaking given by him on instructions from the plaintiff in the action of *Williams v. Swan and Gray Coach Lines, Limited*, to have the action dismissed as against that defendant without costs, according to the terms of the settlement of the said action.

As a result of a collision between a motor coach owned by Gray Coach Lines, Limited, and a motor car driven by the defendant Swan, the plaintiff Mrs. Williams, who was a passenger in the motor coach, was injured, and the defendant Swan and passengers in his motor car were also injured. Swan through his solicitor wrote the Gray Coach company claiming damages and threatening litigation. M., acting as solicitor for Mrs. Williams, on 12th September 1941, wrote the Gray Coach company, also claiming damages on account of the injuries received by Mrs. Williams.

As a result of negotiations between the solicitor for Gray Coach Lines, Limited, and M., a settlement of the claim of Mrs. Williams was arranged in accordance with the terms of the written instructions or authority of the plaintiff to her solicitor. These instructions set out: Gray Coach Lines, Limited, is to give Mrs. Williams \$300.00 in full of damages and her solicitor's costs, plus \$50.00 solicitor and client fee, and the company is to indemnify Mrs. Williams for any costs that may be awarded against her in an action to be commenced against the Gray Coach company and Swan. Mrs. Williams authorizes M. to prosecute the action and, on the same being disposed of, to settle in accordance with the said instructions. Gray Coach Lines, Limited, agreed to the proposed terms and M. issued a writ on behalf of Mrs. Williams against the Gray Coach company and Swan on 20th September 1941, and served a statement of claim in which he claimed his client's out-of-pocket expenses and the sum of \$300.00. Both defendants entered statements of defence, each blaming the other for the accident. Gray Coach

Lines, Limited, in November, settled the claims made by Swan and two of the persons who were passengers in his car. One of the terms of this settlement was to the effect that Gray Coach Lines, Limited, would indemnify Swan with respect to the action brought by Mrs. Williams.

In pursuance of the settlement entered into by M. on behalf of Mrs. Williams, a cheque for \$300.00 in full of her claim and a cheque for M.'s costs were forwarded to M. Subsequently M. obtained an order on consent dismissing the action, which order has not yet been entered. The defendant company also paid the out-of-pocket expenses incurred by Mrs. Williams amounting to \$226.15. After Mrs. Williams repudiated the terms of the settlement, M. offered to return the cheque received by him for costs, but Gray Coach Lines, Limited, has refused to accept it or the cheque for \$300.00 which has not yet been delivered to Mrs. Williams. On the 16th April 1942, Mrs. Williams filed and delivered a notice that she had changed her solicitors in connection with the action.

It is stated on behalf of M. that owing to the change of solicitors, although he is willing to carry out his undertaking which was based upon his client's instructions and consent, he questions his authority to do so. No allegation of improper conduct in any respect is made by anyone against M.

It is contended by Mr. Cartwright on behalf of Mrs. Williams that the settlement should be set aside upon several grounds. The first ground is because of a unilateral mistake, that is, a mistake on the part of Mrs. Williams in consenting to settle the action, because she has since learned that the injuries she received in the accident were very much more serious than she thought them to be at the time the settlement was authorized by her. It is stated that Mrs. Williams has been permanently disabled in the use of her right arm owing to the injuries she received.

I am unable to accept the proposition that this settlement should be rescinded because at the time it was concluded by Mrs. Williams, she did not know, or was mistaken as to, the extent of her injuries. Mrs. Williams may have been hasty in entering into the settlement before the extent of the injuries suffered by her was fully ascertained, but she acted entirely of her own volition. There is no evidence that she was misled in

any way by any act of Gray Coach Lines, Limited, or by any other person.

It is admitted by Mr. Cartwright that Mrs. Williams cannot escape from the instructions given by her to her solicitor, but he contends that as the order dismissing the action has not been entered, and as there has been a mistake of fact, the Court can rescind the settlement because it would be a harshness and a hardship upon Mrs. Williams unless that were done.

In the case of *Goddard v. Jeffreys* (1881), 51 L.J. Ch. 57, 30 W.R. 269, referred to by Kekewich J. in *Van Praagh v. Everidge*, [1902] 2 Ch. 266 (reversed by the Court of Appeal [1903] 1 Ch. 434, on the principal ground that the Statute of Frauds had not been complied with), it was stated that a purchaser may escape from his bargain on the ground of a mistake, if it was a mistake to which the vendor contributed, but if not, and if the mistake was entirely his own, then the Court ought not to let him off his bargain on the ground of a mistake made solely by himself, unless the case is one of considerable harshness and hardship.

In *Tamplin v. James* (1880), 15 Ch. D. 215, James L.J., referring to the cases in which the Court refused specific performance on the ground of mistake, said: "Perhaps some of the cases on this subject go too far, but for the most part the cases where a Defendant has escaped on the ground of a mistake not contributed to by the Plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it."

It can readily be seen that if the settlement of an action where damages are claimed for injuries could be opened up, and the action could be continued to trial, because a plaintiff, at a later date and after an order dismissing the action had been obtained, alleged that he then found that he was suffering from a permanent disability due to the accident which was the subject of the action, unless upon evidence of a most convincing character that injustice and hardship would otherwise ensue, it would destroy the security of all contracts for settlement of an action. The only evidence in support of the plaintiff's present claim that she was permanently disabled is contained in an affidavit made by the plaintiff's husband, who says that his wife was per-

manently disabled in the use of her right arm and otherwise. I do not think it is unreasonable, giving due consideration to all of the circumstances, to conclude that Mrs. Williams should be held to her bargain.

In *Little v. Spreadbury*, [1910] 2 K.B. 658, where the question under consideration was a compromise in an action, made by a solicitor for his client, the headnote reads: "If a client by his conduct induces his solicitor to believe that he is authorized to make a certain compromise in an action which the solicitor is conducting on behalf of the client, and the solicitor, reasonably relying on that conduct and believing that he has the authority of the client, makes the compromise, the client is bound whether he intended to give that authority or not and whether he in fact understood or did not understand the terms of the compromise." Lord Coleridge J., at p. 665, speaking of the right of the client to repudiate a settlement made by his solicitor says: "The client can certainly only do so on the ground of mistake or surprise and at the earliest possible moment—at any rate before an order is drawn up; and if in the meantime the other side has acted on the compromise in such a manner that it would be inequitable to annul it, I think the client would nevertheless, notwithstanding the withdrawal, be bound."

In *Shepherd v. Robinson*, [1919] 1 K.B. 474, in the Court of Appeal, where counsel had consented to judgment, Bankes L.J., at p. 477, said: " . . . there is a . . . line of cases which decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension." As already has been said, an order of the Court was obtained in pursuance of the settlement, dismissing the action, but this order has not yet been entered.

It would seem that no action was taken to repudiate the settlement until the change of solicitors in April, some four or five months after the settlement was completed.

The further ground advanced by Mr. Cartwright is that the settlement is an illegal one and made in contempt of Court and therefore it is void. It is argued that a term of the settlement was that a feigned action was to be brought by Mrs. Williams after all claims made by her in the action had been settled and when she therefore had no right of action.

Mr. Mason on behalf of Gray Coach Lines, Limited, contended that the settlement could not be considered illegal and void on the above-mentioned grounds because at the time the action was brought it was desirable and necessary that the liability as between the Gray Coach company and its co-defendant Swan should be determined, and that being a real issue, it could be conveniently tried in an action brought in the name of Mrs. Williams. It is contended that there was nothing secret about the matter and that although Gray Coach Lines, Limited, was content, and had agreed, to settle the plaintiff's claim against it, nevertheless the issue between the two defendants remained to be determined and could be determined in such an action.

It is difficult to find authority upon this particular point. In the old case of *Coxe and Phillips* (1736), Cas. t. Hardwicke (Lee) 237, 95 E.R. 152, the headnote reads: "In an action, not to determine a right or controversy, but to deceive the Court and to raise a prejudice against a third person, is unlawful, and punishable as a contempt." In this proceeding, one Muilman applied to the Court and represented the action to be a fictitious action by connivance between the plaintiff and the defendant to burden him with actions and to impose upon the Court.

In *Re Elsam* (1824), 3 B. & C. 597, 107 E.R. 855, an attorney, without corrupt or unworthy motives, prepared a special case in order to take the opinion of the Court upon the will of a testator, and suggested several facts which had no foundation. It was held that he was guilty of a contempt.

In *M'Gregor v. Barrett* (1848), 6 C.B. 262, 136 E.R. 1251, where an action was started in the name of the plaintiff and prosecuted to execution, and the plaintiff, colluding with the defendant, discharged him from the execution, it was held there was a contempt.

In these two cases there was the element of deception practised upon the Court.

I am unable to conclude that this action was one brought to deceive the Court or to prejudice anyone. It is true that a promise had been made to settle the plaintiff's claim, but the settlement was not to be concluded until the action was brought. The question of liability as between the defendants had not been determined. The element of a deception practised upon the Court would appear to be necessary to bring the action within the category of a fictitious or illegal action.

Furthermore, the person now seeking relief from the Court is Mrs. Williams, who instituted the action which she now claims is illegal and should not have been brought. The very old rule would seem to apply: he who comes in to equity must come with clean hands.

I am of opinion that M. must carry out the settlement to its final conclusion.

In *United Mining and Finance Corporation, Limited v. Becher*, [1910] 2 K.B. 296, it was held that the Court has jurisdiction to compel a solicitor who had given an undertaking in his capacity as solicitor to carry out such undertaking even though the applicant was not the client of the solicitor and the undertaking was not given in the course of legal proceedings and there was no suggestion of dishonourable or discreditable conduct on the part of the solicitor. This case was followed in our own Court in *Re Solicitor* (1916), 37 O.L.R. 310, 31 D.L.R. 86.

There will be no costs in connection with this application.

Order made as asked; no costs.

The client, Mrs. Williams, appealed from this judgment.

9th November 1942. The appeal was heard by RIDDELL, FISHER and MCTAGUE JJ.A.

J. R. Cartwright, K.C., and *A. W. S. Greer*, for the appellant.

G. W. Mason, K.C., and *G. A. McGillivray*, for Gray Coach Lines, Limited, respondent.

A. A. Macdonald, K.C., for the solicitor, who merely submitted his rights to the Court.

At the conclusion of the argument, THE COURT delivered judgment orally, dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitor for Gray Coach Lines, Limited: Irving S. Fairty, Toronto.

Solicitor for Mrs. Williams: A. W. S. Greer, Oshawa.

Solicitor for M.: A. A. Macdonald, Toronto.

[URQUHART J.]

Re The Solicitors Act; Re Hood.

Barristers and Solicitors—Right to Practice—Unqualified Person Holding Himself out as Solicitor—Rights of Law Society—Penalties—Injunction—Originating Notice—The Solicitors Act, R.S.O. 1937, c. 223, s. 6, as amended by 1940, c. 26, s. 1.

Where an unqualified person practises or holds himself out as a barrister or solicitor, a legal injury is inflicted upon the Law Society, and it has not only a right but the duty, under s. 6 of The Solicitors Act, R.S.O. 1937, c. 223, as amended by 1940, c. 26, s. 1, to apply to the Court for an injunction to restrain such a person from practising. *Society of Accountants and Auditors v. Goodway et al.*, [1907] 1 Ch. 489 at 502, applied. Subs. 3 of the amended section expressly authorizes a proceeding by way of originating notice, and since the usual form of originating notice of motion contains nothing to direct the respondent's attention to the fact that the Court may proceed in his absence if he fails to appear, the Court is not deprived of jurisdiction to make an order under the section in the respondent's absence by the fact that there is no such intimation in the originating notice, as there would be in the event of a proceeding by the alternative method, under The Summary Convictions Act, R.S.O. 1937, c. 136. It makes no difference to the rights of the Law Society in this connection that the statute provides that penalties imposed under the section shall be paid to the Provincial Treasurer.

Where a person, having formerly been a barrister and solicitor, but having been disbarred and struck off the rolls, appears gowned in Court and states that he is entitled to conduct a trial for a litigant, although his conduct may amount to an attempt to practise as a barrister, there can be no doubt that he is also holding himself out as being a solicitor. *Macdougall v. Law Society of Upper Canada* (1890), 18 S.C.R. 203, referred to.

A MOTION for an injunction and other relief. The nature of the relief sought, and the facts, are fully stated in the judgment.

13th October 1942. The motion was heard by URQUHART J. in Chambers at Barrie.

L. E. Blackwell, for The Law Society of Upper Canada, applicant.

No one for the respondent, although duly notified.

24th October 1942. URQUHART J.:—Application by originating notice of motion made on behalf of the Law Society of Upper Canada at Barrie, Ontario, the county of residence of the defendant, under The Solicitors Act, R.S.O. 1937, c. 223, s. 6, as amended by 4 Geo. VI, 1940, c. 26, s. 1. The section as amended reads:

“(1) Unless admitted and enrolled and duly qualified to act as a solicitor, no person shall act as a solicitor in any court of civil or criminal jurisdiction or before any justice of the peace, or shall as such sue out any writ or process, or commence, carry

on or defend any action or proceeding in the name of any other person, or in his own name, or hold himself out as or represent himself to be or practise or for gain or reward act as a solicitor.

“(2) Every person who violates the provisions of subsection 1 shall be guilty of an offence and liable to a penalty of not more than \$100 for a first offence nor more than \$200 for a second or subsequent offence.

“(3) The penalties imposed by this section may be recovered in the manner provided by *The Summary Convictions Act*, or upon application by the Society to a judge of the Supreme Court by an originating notice.

“(4) Where proceedings are taken by an originating notice under this section, the matter shall be heard in the county or district in which the person against whom the proceedings are taken resides.

“(5) Where proceedings by originating notice are taken under subsection 3, the rules of practice of the Supreme Court shall apply provided that the judge upon finding that any person has violated the provisions of subsection 1 may in addition to ordering payment of the penalties, make an order enjoining him from practising as a solicitor, and any order made under this section may be enforced in the same manner as any other order or judgment of the Supreme Court and may be varied or discharged upon an application made by originating notice.

“(6) The penalties recovered under this section shall be paid to the Treasurer of Ontario.”

The notice of motion asks for an order for the following:

(1) A finding that

(a) the respondent, formerly a barrister and solicitor, was disbarred and struck off the roll of solicitors and accordingly ceased to be a member of the Society on the 19th day of June, 1941;

(b) by reason of this fact, he has been prohibited from acting as a solicitor or from holding himself out to be a solicitor;

(c) notwithstanding such prohibition, he has in fact continued to act as a solicitor and to hold himself out as such.

(2) That he pay the penalty provided by s. 6(2) of the Act.

(3) That pursuant to s. 6(5), he be enjoined from practising as a solicitor in Ontario.

So far as the findings are concerned, it appears clearly from the material that on 19th June 1941 the Benchers of the Law Society disbarred the respondent and resolved that he was unworthy to practise as a solicitor. By order of this Court made the same day, the respondent's name was struck off the rolls.

There will therefore be a finding that Joseph G. Hood ceased, on the 19th day of June, 1941, to be a member of the Society and by reason of the above has been prohibited from acting as a solicitor or from holding himself out as one.

In regard to finding (c) asked for, I have no hesitation in finding that since that day the respondent has continued to act as a solicitor and to hold himself out as such.

Two instances of such practising or holding out by the respondent have been sworn to in the material. The first case may be referred to as "the Rogers case". Messrs. Hood and Hood, a firm which consisted of the respondent and his father, had been solicitors for the late Annie Rogers, and one of them had drawn her will in June 1941. Mrs. Rogers died on 13th September 1941, and the executors then went to the Hood offices at Stayner to retain that firm as solicitors to apply to the Surrogate Court of the County of Simcoe for probate. There they saw only the respondent, whom they believed to be a solicitor in good standing. He gave them advice, prepared all papers leading to probate, and did many other things that an ordinary solicitor would do in the circumstances. Several attendances were made by the executors in which time the only person seen by the executors was the respondent. The respondent advised them orally that he had filed the application in the Surrogate Court at Barrie, an allegation which was entirely false. He wrote to one of the executors, on 21st November 1941, the following letter:

"HOOD and HOOD

"Barristers, Solicitors, etc.,

"John Hood, *J. G. Hood*

"Solicitors for Town of Stayner and

"Nottawasaga Township

"STAYNER, ONTARIO

"November 21, 1941.

"Morris J. Rogers, Esq.,

"Box 53,

"Clarkson, Ont.

"Dear Morris:

"Your letter of 17th inst. duly received and did not reply immediately as I had hopes of receiving the Probate off each train. So far *we* haven't received any word from the Court but *we* have notice to file another schedule with the Dominion. *We* can do this when you come up later, but I would like to have a list of all the debts and the name of the creditor with the amount so I can complete the schedule for the Dominion. *We* did not advertise for creditors. Could you forward me a list of the debts. Will write you as soon as I hear further.

"Yours truly,

"JGH/H."

(signed) "*J. G. Hood.*"

It will be noted that the respondent Hood signed the letter personally. The words now italicized are not so indicated in the text.

As a fact, although the respondent said verbally and by letter that the probate papers were filed, they had not been filed by the respondent and now the executors may be in trouble with the Succession Duty department because of the long delay.

There can be little doubt, even on the above outline, that the respondent practised as a solicitor, or at all events held himself out as being such to his client in this instance. The facts are more fully detailed in the affidavit sworn by one of the executors in this matter.

The second case, an action of *Milne v. Bradley*, is one where a writ was issued by a Barrie solicitor, C. D. Stewart. Within ten days an appearance was entered by Messrs. Hood and Hood who also later admitted service of the pleadings but this was done apparently before the disbarment. On an interlocutory motion in the action before the County Court Judge after the disbarment, the respondent appeared attired in the full regalia of a barrister. Stewart, knowing that the respondent had been disbarred and struck off the rolls, asked the respondent if he were "in circulation again" meaning whether he was now licensed to practise. Hood replied in the affirmative. At the opening of court the respondent announced that he appeared for the defendant and some discussion took place in which the respondent was invited into the judge's chambers. There the respondent stated to the judge that he had received permission from the

Society to appear, whereupon it was suggested that the secretary of the Law Society be communicated with by telephone. When Mr. Stewart and the respondent withdrew to telephone, the respondent told the former that a call would serve no useful purpose, and accordingly, as the respondent could not appear, the motion had to be adjourned on terms.

While the episode outlined above might be construed as an attempt by the respondent to practise as a barrister (not the subject of this motion) there can scarcely be any question that the respondent by answering the inquiry as he did and by dealing with the pleadings and proceedings held himself out as a solicitor.

These two cases give rise to the belief that in the short time since his suspension the respondent has been practising as a solicitor without authority so to do, and has been holding himself out as such. The findings requested by clauses (1) (a) (b) and (c) of the originating notice of motion will be made accordingly.

The only way in which a solicitor can be held to be practising as such is by exercising some of the functions of a solicitor, by taking, on behalf of a client, some of the regular steps in an action, or taking part in some other judicial proceeding.

In *Macdougall v. Law Society of Upper Canada* (1890), 18 S.C.R. 203, some of the limitations are set forth. For example the mere endorsement of a firm name on the back of papers in litigation is no part of proceedings in a case and is not considered practising (though I should think the endorsement on a writ of summons would be so considered). In that case too the mere allowing of a name to be used on a business card or in newspaper cards, or on office signs, was held not to be practising.

But in this case there is more to the matter than that, and the whole circumstances as outlined in the two cases show that the respondent was not only holding himself out as a solicitor but was actually practising as such.

As I pointed out on the argument in the recent case of *The Law Society of Upper Canada v. MacNaughton et al.*, [1942] O.W.N. 551, the question for the Law Society and the legal profession is a most serious one. I have practised outside Toronto (where unauthorized practice may have little effect) and I know

that every year thousands of dollars' worth of business is taken from the lawyers by real estate agents, notaries public, insurance agents and others doing the work that should be done by solicitors in the public interest. Such practices are very unfair to the practitioners in the smaller places when done by unauthorized and unskilled persons, and the situation is so much worse when a man who has been struck off the rolls for misconduct carries on as before.

The facts being so very clear and the breach of the statute, to my mind, being certain, I would not have reserved judgment except for two circumstances. First: in *The Law Society of Upper Canada v. MacNaughton et al.*, *supra*, some doubt was expressed in argument as to the status of the Law Society to bring an action in that case against a person allegedly holding herself out as a barrister, for an injunction to restrain the unauthorized person from so practising. If that were so, would it not equally be so in the case of an unauthorized person practising or holding out as a solicitor?

Subs. 3 of the amendment which I have quoted above seems to imply that the Society can make an application against such person. It will be noted, however, that the last part of this subsection refers to procedure, and the Legislature may have assumed erroneously that the Society had such power. I have been able to find very little authority on the matter.

I am of opinion that the Law Society has not only the right but the duty to apply to the Court to restrain unauthorized persons from practising. I cannot better set forth the principles on which that right is founded than by referring to the words of Warrington J. in *Society of Accountants and Auditors v. Goodway et al.*, [1907] 1 Ch. 489, at p. 502. In that case the plaintiff society was incorporated, and later recommended its members to adopt as their professional designation the use, after their names, of the term "incorporated accountant". Within twenty years that designation had come to mean, to the public, a member of the society which, by its systems of tests and examinations, conferred upon its members the valuable privilege of a recognized status for ability and integrity. A rival corporation of accountants attempted to use the same designation with the addition of an abbreviation. They were restrained from so doing.

A person improperly holding himself out to be a member of a society inflicts a legal injury upon the society, in respect of which it is entitled to relief.

So it appears to me that on the words of the statute itself as quoted above, and on the authority of the above cited case, the Society has the status to make the application and the respondent Joseph G. Hood should be enjoined permanently from practising as a solicitor.

Secondly, the penalties imposed by the section are recoverable either under The Summary Convictions Act, R.S.O. 1937, c. 136, or on originating notice. If the penalty were sought under The Summary Convictions Act, the respondent would have been summoned by a form of summons which would demand his attendance at court. The originating notice of motion herein, while it outlined the order sought with considerable detail, merely gave notice that an application would be made at a certain sittings at a certain time and that in support of the application would be read certain affidavits and exhibits. There was nothing in or on the notice to direct the respondent's attention to the fact that he must attend and to any consequences which might follow from his non-appearance.

However, the statute has authorized the procedure by originating notice specifically, and the ordinary originating notice of motion does not give any such command. The respondent, having been a lawyer, should know that if, having been properly notified, he did not appear, the case would be dealt with in his absence.

I would refer to two cases where penalties were sought by notice of motion. The *Macdougall* case, *supra*, was an application to suspend from practice and to impose a penalty under another section of the Act, now s. 22, and there was a somewhat similar application in *Re Clarke* (1900), 32 O.R. 237, where an order was made. The sections under which these applications were made provided that the penalty should go to the Law Society, whereas the penalty, by subs. 6 of the recent amendment to The Solicitors Act, is payable to the Treasurer of Ontario. It might be argued that, the penalty going to the Province, the application should have been made by or on behalf of the Attorney-General, but that would be inconsistent with the wording of subs. 3. I cannot see that the question of who receives the penalty makes any material difference.

The Society therefore is entitled to, and there will be judgment for, the declarations asked, and judgment enjoining the respondent, Joseph G. Hood, from practising as a solicitor, and further ordering that he shall pay forthwith a penalty of \$100.00 (this being his first offence) and the applicant's costs of this application forthwith after taxation thereof.

Order accordingly.

Solicitors for the applicant: Zimmerman, Blackwell & Haywood, Toronto.

[URQUHART J.]

Traders Finance Corporation Limited v. Ross et al.

Guarantee and Suretyship—Rights of Surety—Indemnification—Transfer of Securities—Creditor Disabling himself from Transferring—Discharge of Surety.

A surety is entitled, on paying the guaranteed debt, to a transfer of all securities held by the creditor, and if the creditor has disabled himself from transferring a security, the surety is *pro tanto* discharged. A finance company discounted conditional sale agreements for an automobile dealer. In several instances, on a purchaser's default, the company repossessed the automobile, extinguishing the buyer's rights, and then, instead of itself reselling it, handed it back to the dealer for resale. *Held*, by thus removing the security, the finance company had discharged the sureties for the dealer, as to all transactions in which the car could not be recovered from the dealer and delivered to them for salvage.

The guarantee here in question extended to "all agreements of Dealer . . . now in force or hereafter made". *Semble*, this could not be extended to cover cases in which the car had been repossessed and returned to the dealer before the execution of the guarantee. *McMartin v. Graham* (1846), 2 U.C.Q.B. 365, applied.

AN action upon a guarantee. The facts are fully stated in the judgment.

26th October 1942. The action was tried by URQUHART J. without a jury at Toronto.

F. G. Gardiner, K.C., for the plaintiff.

No one for the defendant.

14th November 1942. URQUHART J.:—Action for the sum of \$2,571.77 against two sureties, husband and wife, upon a guarantee.

When the case was called on 26th October, no one appeared for the defendants. However counsel for the plaintiff produced a telegram sent to George Mitchell, barrister, Kirkland Lake,

on 23rd October, advising him that the case would be reached on Monday the 26th October, and giving the number of the court room and the time, and adding that the plaintiff would require that the trial be then proceeded with. The plaintiff refusing to adjourn the matter further, I proceeded with the case. During the course of the hearing Miss Mitchell, the daughter of the solicitor for the defendants, appeared but said she had no instructions and finally asked leave to put in a written argument, which leave was granted. It does not seem probable that any evidence which might be offered by the defendants would be of any assistance because the case, as it appears to me, resolves itself into a question of law.

The male defendant, E. Ross, in spite of his name, is a French Canadian and speaks very little English. He had been a farmer but had apparently considerable mining interests and was said to be a man of somewhat more than average education. His wife, Grace Ross, formerly Pion, is bilingual and speaks, I understand, very good English.

The brother of the female defendant, one T. Pion, carried on, prior to 13th March 1941, a business as a garage proprietor and dealer in motor vehicles, at Holtyre, Ontario, a small place near Kirkland Lake. As he was rather shaky financially, the plaintiff, a company which discounts conditional sales agreements, secured a guarantee of his accounts from the defendants, I presume in order to allow him to continue in business. The securing of this guarantee was entrusted to a young man named John K. Peverly (now in His Majesty's forces), and Peverly swore that he had told the Rosses that Mr. Pion might be weak financially, and explained that if he failed to meet his obligations they might be called upon to pay all or part of the indebtedness. He swore that he read over the guarantee agreement to them and took considerable time explaining it to them, and that he is confident that they understood the nature of the agreement. As no one appeared for the defendants, I questioned him as to the explanation he gave to these people, and although he thinks that he dealt pretty thoroughly with the various points contained in the written document (Ex. 2), I doubt whether he could have explained the salient matters thoroughly, especially the part which purports to waive some of the defendants' fundamental rights as sureties.

For some reason unexplained, the plaintiff had the document translated into French and had it signed by the sureties (Ex. 3), some eight days later and before acceptance by the plaintiff. The acceptance by the plaintiff was made on 24th March 1941.

The agreement itself, Ex. 2, is a very wordy and intricate document, and would require considerable explanation. It was evidently drawn up originally by an American lawyer and probably revised by the solicitors for the plaintiff. For convenience, it is best to set out the applicable parts in detail. The italics are mine.

"In consideration of Traders Finance Corporation Limited, herein called 'Traders Finance' purchasing or otherwise acquiring any notes, drafts, acceptances, leases, trust receipts, conditional sale contracts, chattel mortgages, accounts receivable, or other obligations or choses in action, herein called 'Instruments', bearing the signature as Maker, Endorser, Guarantor, Acceptor, Assignor or in any other capacity of Northern Garage, (T. Pion) of Holtyre, Ontario, herein called 'Dealer', each of the undersigned does jointly and severally guarantee to Traders Finance and to its affiliated and subsidiary companies, due payment, faithful performance and discharge by Dealer of any and all such 'Instruments', *and all agreements of Dealer with Traders Finance now in force or hereafter made, (hereafter called 'Agreements')* without requiring Traders Finance to realize upon, or offer or return any instruments or security held, or bring any legal or equitable action, or attempt to enforce any recourse it may have, against Dealer or any one liable in any capacity on any Instrument (hereafter called 'Party') or any other third party.

"Notice of acceptance of this guaranty is hereby waived. Presentment, demand, and protest, and notice thereof and of non-payment or breach of any and all Instruments or Agreements, and all other notices to which the undersigned might otherwise be entitled are hereby waived. Any right to extension, composition, or other relief, afforded the undersigned, the Dealer or any Party under the Bankruptcy Act, the Winding-up Act, the Companies Creditors Arrangement Act, the Farmers Creditors Arrangement Act, or under any other present or future Dominion or Provincial legislation, is hereby waived and the undersigned will be liable for and perform and/or pay each and every obligation set forth and the full amount specified

in instruments and agreements forthwith after any obligation has not been performed and or any amount has not been paid on the date specified in the instrument or agreement.

“Renewals and extensions of the times of payment or performance of Instruments or Agreements may be made and any compromises, adjustments or indulgences may be granted Dealer or any Party, additional securities may be taken and held, *and any securities held may be wholly or partly released*, and all moneys received from any source may be applied to such part of Dealer’s obligations as Traders Finance may see fit, without notice to, and without affecting or discharging the liabilities of undersigned; *said liabilities shall not be affected, impaired or diminished by reason of any instrument, agreement or other writing being invalid, incorrect, defective, forged, fictitious, imperfect or insufficient.* Traders Finance may proceed at law or equity for the enforcement of any claim hereunder against any one or more of the undersigned without joining or in any manner affecting the liability of any other of the undersigned and undersigned will pay Traders Finance all costs, expenses and solicitors fees incurred . . .

“The undersigned agree that there are no representations, collateral agreements or conditions, express or implied, statutory or otherwise affecting the rights and liabilities of the parties hereto other than specifically contained herein.

“This guaranty is a joint and several, unconditional, continuing guaranty, but it may be terminated by undersigned serving written notice upon Traders Finance, provided, however, that as to all Instruments purchased or acquired and all obligations of Dealer, contingent or absolute, incurred up to the time of the receipt of such notice, this guaranty shall be continuing and unconditional until the same are fully paid, performed and discharged.

“The termination of this guaranty by one or more of the undersigned shall in no manner affect the obligations of each or all of the undersigned remaining, nor shall this guaranty be discharged or voided by the death of any of the undersigned, but shall bind their respective heirs, executors, administrators and assigns, and the benefits thereof shall extend to and include the successors and assigns of Traders Finance and its affiliated and subsidiary companies to whom the undersigned jointly and

severally make the same promises as are made to Traders Finance herein."

It is not shown that either of the defendants, and especially Mrs. Ross, had independent legal advice on the document, but it appears that Pion and Mrs. Ross explained the document in detail to the defendant husband.

Pion continued in business, and, both before and after the guarantee, entered into a number of transactions with the plaintiff. There is no evidence, but I presume that the details of none of these transactions were known by the defendants, especially those which occurred before Ex. 2 was executed by them.

The first transaction is in the nature of a chattel mortgage upon two cars. This mortgage was dated the 24th day of June 1941, and was made to secure a promissory demand note for \$978.57. The note was made directly by Pion to the plaintiff. The chattel mortgage which secured the note was upon two cars, and the amount advanced in respect of each car, as Ex. 4 shows, is clearly set out. The second of these cars was sold and the sum of \$500, which represented the loan upon that car, was paid by Pion to the plaintiff. It turned out, however, that the other car, still covered by the mortgage, had been acquired by Pion without knowledge of a lien held by another finance company, and that car was subsequently repossessed by the other company. Pion has not paid the money and there does not seem to be any reason why this should not be paid by the defendants under the guarantee.

The remaining transactions deal with conditional sale agreements. In each case Pion sold a truck or a car to a purchaser on terms, and vendor and purchaser entered into a written agreement, called a conditional sale contract, to secure payment of the balance of the purchase price of the vehicle. Payments were by monthly instalments.

Each contract, by para. 2, provides: "The deferred balance hereby secured is also secured by a Promissory Note bearing even date herewith for the principal sum hereby secured, payable in like instalments to those herein contained."

Unlike the chattel mortgage, where the note was the primary liability and the chattel mortgage was the security, the conditional sale contract and the note stand on an equal footing as security for the indebtedness.

Paras. 9 and 11 of the contracts are also important.

The former gives to the vendor, on non-payment and many other contingencies, the benefit of acceleration of payments and the right to repossess the vehicle for the balance due; the latter contemplates the assignment of the contract to the plaintiff and provides for pretty comprehensive releases.

In each case the contract is assigned by Pion to the plaintiff in the following words:

“FOR VALUE RECEIVED undersigned hereby sells, assigns and transfers to Traders Finance Corporation Limited all undersigned's right, title and interest in and to the within contract and the property therein described. Undersigned warrants that all property described in the within contract is free and clear of all liens, claims and encumbrances other than created by the within contract. Undersigned warrants that the property described in the within contract is new unless otherwise specified and that the cash payment specified in the within contract was actually received by undersigned in cash and that no part of the said cash payment was loaned to the purchaser by the undersigned. Undersigned hereby guarantees the full performance of all of the covenants and agreements of the purchaser named in the within contract and in the event of repossession and resale agrees that undersigned shall be jointly and severally liable with the purchaser for any deficiency between the net amount actually received upon such resale and the amount secured by the agreement hereby assigned. Undersigned certifies that a true copy of the within contract was duly registered in the proper registration office.” In each case also the note given is endorsed with recourse by and to Pion. The margin of the note sets out the monthly instalments.

The second transaction was on a conditional sale contract and a note for \$1,740.50 made by one Alex Lafreniere and dated 15th August 1940, before the guarantee was entered into. This note was endorsed to the plaintiff with recourse by Pion. It provided for repayment at the rate of \$100 per month for 17 months and a small balance in the eighteenth month. This transaction arose from the sale of a truck to Lafreniere. The truck was subject to the conditional sale contract. There still remains a balance of \$225.14 due in respect of this transaction. Apparently Lafreniere fell down on his payments and the truck was repossessed from him by the plaintiffs and the usual notices were given to him, and after the lapse of twenty days Lafre-

niere's interest in the truck was extinguished. I am assuming that all legal steps of repossession were followed by the plaintiffs in these transactions.

Under a verbal agreement with Pion, instead of the plaintiff taking the truck to some warehouse and selling it either with or without putting it in shape, it returned the truck to Pion, who sold it for \$566.67 in cash and a 1936 Ford truck and 22M. feet of lumber. The cash was turned in by Pion on the arrears, but Pion disposed of the Ford truck taken in exchange without turning in the proceeds to the plaintiff. The 22M. feet of lumber was given by Pion to another creditor of his to appease him.

The third transaction has reference to a conditional sale contract and a note for \$920 given on 31st August 1940, by two parties named Messier to Pion, and by him endorsed to the plaintiff with recourse. The note was to be repaid in 23 monthly payments of \$40 each. For several months, and up to 11th September 1941, the \$40 per month was duly paid, but since that date there have been no payments, and there is an unpaid balance of \$440. In this transaction, the car in question was repossessed by the plaintiff and instead of being sold in the ordinary manner it was returned to Pion. This car is still in Pion's possession, and is probably worth close to the sum of \$440 due on it. It will be noted that this and the next transaction occurred before the date of the guarantee agreement.

The next transaction refers to a conditional sale contract and a promissory note dated 21st September 1940, made between a man named Drouin and Pion for \$478 payable in seventeen monthly instalments of \$27 each and a small balance in the eighteenth month. This note was also endorsed to the plaintiff by Pion with recourse. Only one small payment was ever made by Drouin, and there is a balance of \$457.40 now due and the car represented was repossessed and returned to the dealer on 26th September 1940, before the guarantee transaction occurred. Pion sold this motor for \$250 and applied the proceeds to his own purposes.

The next transaction is one in respect of a conditional sale contract and a note made by one Cameron on 3rd October 1940 (also before the guarantee contract) for \$483 repayable in seventeen monthly instalments of \$27 each and a small balance in the eighteenth month. This note again is endorsed by Pion

to the plaintiff with recourse. Only two payments were made by Cameron, and the car represented was repossessed before the guarantee agreement was entered into. It was returned to Pion under the verbal agreement and was resold by him to another upon a new conditional sale contract; this contract was assigned to another finance company, which has since repossessed the car. The sum of \$429 is still due on this transaction to the plaintiff.

The next and last transaction is in respect of a conditional sale contract and note dated 1st October 1941, for \$555, repayable at \$31 a month for seventeen months and a small balance in the eighteenth month, by one DeGurse in respect of a car. Only four monthly payments were made, and there is still \$431 due on this contract. The car was repossessed and as usual was returned to the dealer and is still in his possession, but it is hard to say whether the value of the car is sufficient to satisfy the balance or not, although it is so claimed by the defendants in their statement of defence.

As the defendants did not appear, it seemed to me that I should scrutinize the case for the plaintiff with some care. Two matters which are not apparent on the pleadings, as well as the request by Miss Mitchell, caused me to reserve judgment.

The first matter concerns the rights of a surety.

A surety "is entitled to the benefit of all securities, whether known to him (the surety) or not, which the creditor has against the principal, and where the creditor has, by his own act, rendered unavailable part of the security, to the benefit of which the surety is entitled, the latter will be discharged *pro tanto*. For it is the duty of the creditor, as soon as the surety has paid the debt, to make over to him all the securities which he (the creditor) holds, in order that the surety may recoup himself." De Colyar on Guarantees, 3rd ed., pp. 321-2.

"This right . . . is not necessarily dependent upon contract, but is the result of the equity of indemnification attendant on the suretyship", *ibid.*, p. 322.

In this particular case the plaintiff, by returning the cars to the debtor, under a verbal agreement that it was to return any repossessed vehicle to him for sale (a method convenient to the debtor and to the plaintiff, but very prejudicial to the defendants if the debtor was dishonest or hard pressed for cash, as he was), has deprived the sureties of their equitable right

of indemnification in all cases except two, where the cars are said to be on hand, and in these two cases it may be that the cars have also been alienated by Pion.

It is said that the sureties knew of, and consented to, this arrangement. On my raising the point, counsel for the plaintiff wanted to recall Mr. Peverly, who by that time had left the Court room, in order to prove that he had informed the defendants of this arrangement and that they had consented to it verbally. I pointed out that this evidence might not be admissible in view of the last clause on page 1 of Ex. 2, which reads:—

“The undersigned agree that there are no representations, collateral agreements or conditions, express or implied, statutory or otherwise affecting the rights and liabilities of the parties hereto other than specifically contained herein.”

Although “the undersigned” might be construed to be only the defendants, the plaintiff also comes in the classification of “the undersigned”. Such a clause as this should operate to protect both parties from verbal agreements of this sort, which are hard to prove, and which may be non-existent.

Although Mr. Peverly returned to the Court room during the argument, counsel for the plaintiff made no effort to have him prove the knowledge of the defendants as to this collateral verbal agreement, or to tender his evidence to that effect, and I assume that he could not prove it.

The ordinary rule as to the right of sureties to indemnification should apply in this case in aid of the defendants, unless by the contract itself they have contracted themselves out of any such right. Such a contracting out should be very clear and unambiguous.

The underlined parts of paras. 1 and 3 of the contract of guarantee seem to deal with the situation.

In para. 1 faithful performance of the conditional sales contracts is guaranteed by the defendants, “without requiring Traders Finance to realize upon, or offer or return any instruments or security held . . . or attempt to enforce any recourse it may have, against Dealer” or others.

In para. 3 it is provided that “any securities held may be wholly or partly released”.

Neither these clauses, nor any other that I can find in the contract, quite fit the situation, and, of course, as against the plaintiff, the contract must be strictly construed.

If the plaintiff had simply done nothing about the security, it might, under the contract, have recourse against the sureties, but when actually the plaintiff has exercised its right of repossession, and has taken in the car covered by the conditional sales contract, and has extinguished any right of the purchaser thereof, I am of opinion that it cannot give the car back to the dealer, and leave to the dealer's honesty and discretion what to do with the money if and when the car is sold. The defendants have the right to securities actually realized by the plaintiff, and by its act in giving these vehicles back to Pion and allowing him to convert the same to his own use, the defendants have been prejudiced and so should be released *pro tanto* on the principle referred to above. This applies to all except two of the cases above mentioned, where the cars are said to be still on hand. As to these two, the situation is that if the cars, or either of them, are still in Pion's hands the sureties are entitled to salvage what they can on payment of the amounts due in respect of them, and to apply the amount realized against the particular liability.

If these cars are not in Pion's hands, then in respect of the transactions in which they have place, the sureties would be released.

In considering the above I have not dealt with the question of lack of independent advice so far as the female defendant is concerned. It may be that with respect to her the whole contract might be avoided, but I gather that that would make very little difference, as the husband is the substantial party.

The second matter is this:— does the guarantee agreement cover matters already under contract before its date, several of which, *viz.*, the Lafreniere, the Messier, the Drouin and the Cameron transactions, were hopelessly in default? In each of these four transactions, except the Messier case, the cars had been repossessed and returned to the dealer as described above, before the guarantee was even entered into. The plaintiff had exercised the lien and had at the time extinguished, by recognized legal processes, the claim of the purchaser of the vehicle. In each case, except the Messier, the car had been returned to Pion before the guarantee was given, and the transaction, so far as the conditional sale was concerned, except for payment, was at an end. I gather that there would be no use trying to get any money from one of these purchasers after the car had

been repossessed. Pion, however, still owed the balance on the note.

Offhand, one would think that a contract of guarantee, in such circumstances, would have no retrospective action. In para. 1 the consideration, the contract not being under seal, is expressed as future, *i.e.*, purchasing or otherwise acquiring notes, etc., called "instruments", of Pion. The guarantee, however, not only extends to all such instruments, but also purports to include "all agreements of Dealer with Traders Finance now in force or hereafter made".

It is difficult for me to see how a transaction that is fully closed except for the indebtedness of Pion, and where the security is fully realized, as is the case in three of the above matters, could be binding upon the defendants.

In the Canadian Abridgment, vol. 21, col. 345, in digesting the case of *McMartin v. Graham* (1846), 2 U.C.Q.B. 365, the author says that it must be shown that default took place during the period for which the sureties were liable under the contract.

An examination of that case discloses that the period for which the surety there was held not liable was subsequent in time, but I am of opinion that the reasoning above would apply to time existing before the contract was entered into, unless there was pretty conclusive wording to the contrary in the agreement itself.

I only mention this as an additional reason why there could be no claim in respect of the Lafreniere, Drouin and Cameron transactions, and probably also in respect of the Messier transaction, which was entered into before the guarantee and in which default occurred during the guarantee period.

The result is that the plaintiff is entitled to payment of the sums due in respect of the chattel mortgage above mentioned, *viz.*, \$478.57; also, provided the car sold to DeGurse is on hand and can be delivered to the defendants, the amount due on that transaction, *viz.*, \$431.00. If the car is not available, then there will be no recovery of this sum.

In regard to the Messier transaction, if the car concerned in it is available, then the plaintiff will be entitled to recover the sum of \$440.00, but not otherwise.

It will be referred to the Local Judge at Haileybury (if the parties cannot agree on this point) to determine whether the

cars in the DeGurse and Messier transactions can be turned over to the defendants. The responsibility of getting the cars and making them available to the defendants is to be upon the plaintiff.

There will in any event be no recovery in respect of sums due to plaintiff from Pion in respect of the Lafreniere, Drouin and Cameron transactions.

The plaintiff will be entitled to recover interest upon the transactions in which it succeeds, and if the parties hereto cannot agree on the amount, the determination of it will also be referred to the same Local Judge. Costs of the reference to be in the discretion of the Local Judge.

If the parties agree on the above points, judgment can be entered for the amount agreed upon.

If the parties cannot agree, judgment will be for the sum of \$478.57 on the chattel mortgage transaction with interest, and in addition for such sums as may be found due on the above reference by the Local Judge, also with interest.

The plaintiff will be entitled to costs. This action could easily have been tried in the County Court, as the recovery will be of only a fraction of the plaintiff's claim, so if the amount ultimately realized is within County Court jurisdiction, Rule 649 should apply.

The defendants are to be allowed to amend their statement of defence to set up the two points above discussed. Not to allow such an amendment would be to reduce law to a game rather than to permit it to secure justice between the parties.

Judgment accordingly.

Solicitors for the plaintiff: Parkinson, Gardiner & Willis, Toronto.

Solicitor for the defendants: George Mitchell, Kirkland Lake.

[COURT OF APPEAL.]

Manella v. Manella.

Divorce and Matrimonial Causes—Annulment of Marriage—Wife's Insanity at Time of Marriage—Test to be Applied—Limits of Court's Jurisdiction.

Conflict of Laws—Domicile—Marriage of Insane Woman—Domicile Not Affected.

Lunatics—Proceedings by and against—Proper Proceedings in Default of Appearance where Defendant of Unsound Mind—Matrimonial Cause—Rules 95, 807.

The plaintiff and the defendant, both of whom were then domiciled in Saskatchewan, were married in Manitoba, after which they returned to Saskatchewan. After a few weeks' cohabitation, the plaintiff (the husband) left the defendant, and he later moved to Ontario, where he established a new domicile. The wife remained in Saskatchewan. Some years later this action was brought, in Ontario, for a declaration of nullity of the marriage on the ground of the wife's insanity. *Held*, the action must fail. Even if the husband succeeded in establishing insanity sufficient to avoid the marriage, within the rules laid down in *Harrod v. Harrod* (1854), 1 K. & J. 4, and *Durham v. Durham* (1885), 10 P.D. 80, it would seem that the Courts of Ontario would have no jurisdiction, since, if the wife was insane at the time of the marriage, her domicile would not change with that of the husband.

Held, further, the proceedings in the action were a nullity, because of the plaintiff's failure to observe the provisions of Rule 95 (made applicable to matrimonial causes by Rule 807), prescribing the procedure to be followed in default of appearance by a defendant who was a mentally incompetent person not so found.

AN appeal by the plaintiff from the judgment of Urquhart J. dismissing an action for a declaration of nullity of marriage. The facts are fully stated in the judgment.

The action was dismissed by the trial judge on the ground that although it was clear that the defendant, at the time of the trial, was hopelessly insane, there was no sufficient evidence to justify a finding that she was insane at the time of the marriage. His judgment concluded as follows:

"It would, I think, be taking a long step if I were, upon the evidence, to make a declaration of nullity. More than mere living together is involved, and as in cases of domicile, to use the words of Lord Macnaghten in *Winans et al. v. Attorney-General*, [1904] A.C. 287, at 291: 'The change may involve far-reaching consequences in regard to succession and distribution'."

8th November 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and GILLANDERS JJ.A.

E. F. Singer, K.C., for the plaintiff, appellant.

No one for the defendant, respondent.

16th November 1942. The judgment of the Court was delivered by

MIDDLETON J.A.:—This was an undefended action brought by a husband against his wife, one Fanny Manella, for the purpose of obtaining a declaration of nullity of their marriage. The writ of summons was issued and the statement of claim was filed on 21st February 1939. The statement of claim sets forth that the plaintiff is a fur operator residing in the city of Toronto, and the defendant is the wife of the plaintiff, presently residing in the city of Yorkton in the Province of Saskatchewan; that the marriage took place on 10th March 1935, at the city of Winnipeg, in the Province of Manitoba, the parties to the marriage residing at Yorkton, in the Province of Saskatchewan; that after the marriage the parties continued to reside at Yorkton aforesaid, and that they have not cohabited within this jurisdiction; that at the time of the marriage the plaintiff was domiciled in the Province of Saskatchewan, but that he is now domiciled in Ontario; and that at the time of the marriage, the defendant “was and ever since has been insane”.

The allegation of insanity at the date of the marriage is of importance as our Court has not a wide jurisdiction over marriage, and can only determine the status of the parties at the date of the ceremony. If insanity occurs subsequently, this Court has not, as in England, power to declare the nullity of the marriage, or to grant a divorce.

The father and mother of the defendant were residing in Winnipeg. The plaintiff went there for the purpose of the marriage, and, likewise, the defendant. This is significant, as a statute of the Province of Saskatchewan provides for the necessity of a medical examination prior to marriage, which would have revealed an unsatisfactory condition of affairs in this case.

Manella and his wife had known each other for two weeks only, and on the occasion of the marriage Manella observed peculiar conduct on the part of his bride which, possibly, indicated insanity. Manella took his bride to Yorkton and lived with her as man and wife for a month, when he left her, under circumstances which are not disclosed in the evidence, but probably because her mental condition developed itself and she became worse. She was ultimately removed to an asylum in Saskatchewan, where she is now confined. Manella since his marriage, has changed his domicile to Ontario. He instituted this action here for the purpose of obtaining an annulment of

his marriage. In the meantime, the wife is and has continued to remain, in the Province of Saskatchewan.

The action came on for trial on 19th June 1942, before the Honourable Mr. Justice Urquhart, who reserved judgment and afterwards delivered it on 26th June 1942, dismissing the action without costs. He gave his reasons, stating that he was in grave doubt at the trial, but "there is no question that the defendant is now insane and quite incapable of carrying on the duties of a wife." The condition is progressive, and incurable. His difficulty was to say that "she was at the time of marriage to such a degree insane that she was incapable of entering into the contract of marriage." The plaintiff at the time of the marriage noticed certain silly things in her conduct, but they were not sufficiently developed to warrant any action on the plaintiff's part.

The evidence was very scant and meagre. It consisted of the plaintiff's own story, and the evidence of a medical man in Saskatchewan taken under commission. An endeavour was made to supplement this by evidence of a professional man in Toronto, but neither the plaintiff nor the medical man was able to testify as to the actual condition of the wife. It was assumed that she had had sleeping sickness, but no one proved it, and the action therefore failed.

On the appeal before us, Mr. Singer contented himself with admitting that the evidence failed to establish a case, but asked for a new trial. He said that he would undertake to see that there was evidence which would justify a verdict. Before Mr. Singer is allowed to implement his undertaking, we think it desirable to draw his attention to several facts which appear to have been ignored.

By Rule 95, where no appearance has been entered to a writ of summons for a defendant who is a mentally incompetent person not so found, the plaintiff may apply for an order appointing a guardian of such defendant, by whom he may appear and defend. This motion is to be made upon notice to the person in whose custody the lunatic is confined, and the Official Guardian is to be appointed unless the Court, for good reason, otherwise directs. This is made to apply to the case of a lunatic in a matrimonial cause by Rule 807. Nothing of that kind was done in this case, and it is hard to see why the requirements of the Rules were ignored. It seems to us that all that has been

done in the action, subsequent to ascertaining the defendant's default in appearance, is void.

It is said that a case of insanity can be made out sufficient to entitle the appellant to obtain relief. He alleges that he is entitled to relief because of the insanity of the wife at the time of the making of the marriage contract.

The degree of sanity necessary to enable a wife to enter into a valid marriage was investigated by Sir William Page Wood V.C., in the case of *Harrod v. Harrod* (1854), 1 K. & J. 4, 69 E.R. 344, who said that it was necessary that she should know and understand that by entering into the marriage ceremony she undertook to live with the man as her husband, withdrawing herself entirely from the affections of any other. If she assented to this, she assented to all that was necessary.

The same principle was laid down in *Durham v. Durham* (1885), 10 P.D. 80, where Sir James Hannen, President of the Probate, Divorce and Admiralty Division, laid down the law in similar terms. All that was necessary, he said, was that the wife, at the time of the marriage, should be "of sound mind, so as to be able to enter the contract of matrimony." He continued:

"All the authorities bearing on the subject have been brought to my notice, but I do not think it necessary to review them, as I am of opinion that every case of this kind must be decided upon its own facts. Nor do I consider that it would be useful to borrow from my predecessors, or to attempt myself to form any exact definition of what constitutes soundness of mind. I accept for the purposes of this case the definition which has been substantially agreed upon by the counsel to whom I have to express my obligations for the very able assistance they have given me, namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word 'understand'. If I were to attempt to analyse this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it. I may

say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. It seems to me that the determination of the case must depend upon whether I come to the conclusion that there were such symptoms of insanity manifested by the respondent on the 28th of October, 1882 [the date of the marriage]. In considering this question, I think it cannot be regarded, as the Attorney General contended, as though it had arisen on a will made by the respondent immediately after the wedding, speedily followed by the respondent's death. I am bound to take into consideration the fact that she has now become manifestly insane. I must look at the nature of that insanity, and form an opinion from the general history of the case, whether it is recent or sudden in its inception, or whether it has been of slow growth, and whether it had begun before the marriage and had by that time reached a stage which incapacitated the respondent from entering into the contract of marriage."

Thus far the case presents no special difficulty; but bearing in mind our limited jurisdiction, it is necessary that we should determine whether the marriage was a valid contract at the time it was entered into, for from this alone flows the consequence of the wife's change of domicile by reason of the marriage. I think it will be found that the wife did not change her domicile by reason of her husband's change of domicile, and that the Courts of this Province have no power to declare the invalidity. It appears that the husband did not change his domicile until after the wife was insane. I do not know how

he can, under the circumstances here existing, ask the Courts of this Province to interfere.

The appeal should be dismissed and the husband should not be allowed to further trouble this afflicted wife. The judgment is not *res judicata*, for this Court never had any jurisdiction. From the time limited for appearance, the proceedings were void and of no effect. Attention ought to be paid to the father and mother of the wife. Their conduct appears to warrant inquiry. They have left their daughter a charge upon the public and have not offered any explanation.

Appeal dismissed.

Solicitors for the plaintiff, appellant: A. and E. F. Singer, Toronto.

[PLAXTON J.]

Re Dunn Estate; Fennell et al. v. The Treasurer of Ontario.

Succession Duties—Incidence of Duty—Allowance to Widow under The Dependants' Relief Act, R.S.O. 1937, c. 214—The Succession Duty Acts, R.S.O. 1927, c. 26; 1939 2nd Sess. (Ont.), c. 1.

Where a Surrogate Court Judge, under The Dependants' Relief Act, R.S.O. 1937, c. 214, increases the amount payable to the widow of a deceased person, the increase is not subject to succession duties. It is neither a "succession" nor "property passing on death" within the meaning of The Succession Duty Act, R.S.O. 1927, c. 26, and amendments thereto.

AN appeal, under s. 31 of The Succession Duty Act, 1939, 2nd Sess. (Ont.), c. 1, from a statement of duty payable by the widow of James A. Dunn, deceased.

The deceased died on 28th August 1933, leaving a will whereby he directed his trustees to pay his widow a monthly allowance of \$200. On a motion by the widow, under The Dependants' Relief Act, 1929 (now R.S.O. 1937, c. 214), an order was made by a Surrogate Court Judge ordering that, in addition to the provision made by the will, a further annual sum of \$5,600 should be paid to the widow out of the income of the estate, and that she should be entitled to the use and occupation, during her lifetime, of the residence occupied by the deceased (this occupation to be free of rent, but subject to the payment of taxes, insurance and the cost of repairs), and to the use and enjoyment of the furniture contained in the residence.

A revised statement was then prepared, showing succession duty payable by the widow on the value of an annuity of \$8,000, and on the value of the life interest in the house and furniture. The executors and the widow appealed against this assessment, in so far as it was based upon the allowance secured by the order above referred to.

27th and 30th October 1942. The appeal was heard by PLAXTON J. at Toronto.

D. H. Porter and Eileen Mitchell, for the appellants.

C. R. Magone, K.C., for the Treasurer of Ontario, respondent.

30th October 1942. PLAXTON J. (orally, at the conclusion of the hearing, after setting out the facts):—The relevant provisions of The Succession Duty Act, R.S.O. 1927, c. 26, and amendments thereto (which, it was not disputed, govern the determination of the question of the widow's liability for the duty claimed to be payable by her) are:

"8. (1) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates hereinafter imposed."

"9. Subject to the exceptions mentioned in sections 6, 7 and 8 there shall be levied and paid for the purpose of raising a revenue for Provincial purposes in respect of any succession or on property passing on the death according to the dutiable value, the following duties over and above the fees paid under The Surrogate Courts Act".

S. 3, as amended by 1931, c. 7, defines in precise language what "shall be deemed to confer . . . a 'succession' " within the meaning of the Act as follows:

"3. Every disposition of property whether made before or after the 1st day of July, 1892, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death happening after the 1st day of July, 1892, of any person, at the time of his death, domiciled in Ontario, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any per-

son so domiciled to any other person in possession or expectancy shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession', and the term 'successor' shall denote the person so entitled."

Then there are certain expressions used in ss. 8 and 9 which are the subject of definition in s. 1, as follows:

"1. (f) 'Passing on the death' shall mean passing either immediately on the death or after an interval, either certainly, or contingently, and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Ontario or elsewhere:

"(g) 'Property' shall include real and personal property of every description and every estate and interest therein capable of being devised or bequeathed by will or of passing on the death of the owner to his heirs or personal representatives."

The question which the rival contentions of the appellants on the one hand and of the Provincial Treasury department on the other hand raise for decision is this: Do the increase of the widow's annuity ordered to be paid out of the income of the estate by the order made by the Surrogate Court Judge under The Dependants' Relief Act and the life estate in the Scarth Road property and the furniture thereat secured to her by the same order constitute either a "succession" or "property passing on death" within the meaning of The Succession Duty Act? Counsel stated in argument that they had been unable to find any decision of direct bearing upon the determination of this question.

Before proceeding to discuss the interpretation of pertinent provisions of The Succession Duty Act, it will be convenient to consider the language and effect of the provisions of The Dependants' Relief Act. The leading provision of the Act is s. 2, which reads, in part, as follows:

"2. (1) Where it is made to appear to a judge of the surrogate court of the county or district in which a testator was domiciled at the time of death that such testator has by will so disposed of real or personal property that adequate provision has not been made for the future maintenance of his dependants or any of them, the judge may make an order charging the whole or any portion of the estate in such proportion and in such man-

ner as to him may seem proper, with payment of an allowance sufficient to provide such maintenance.

“(2) The allowance may be by way of an amount payable annually or otherwise, or of a lump sum to be paid, or of certain property to be conveyed or assigned either absolutely or for life or for a term of years to the dependant by whom or on whose behalf the application is made, or for his use and benefit as the judge may see fit. . . .”

The following definitions are found in s. 1:

“1. (b) ‘Dependant’ shall mean and include the wife or husband of a testator, the child of a testator under the age of sixteen years and the child of a testator over that age who through illness or infirmity is unable to earn a livelihood.”

“1. (e) ‘Testator’ shall mean and include a person who by deed or will or by any other instrument or act so disposes of real or personal property, or any interest therein, that the same will pass at his death to some other person.”

“1. (f) ‘Will’ shall mean and include any deed, will, codicil, instrument or other act by which a testator so disposes of real or personal property that the same will pass at his death to some other person.”

The remaining provisions of the Act deal, for the most part, with matters of procedure touching an application under the Act.

The Dominion of New Zealand was the pioneer in enacting legislation of this nature. Its corresponding statutory provision is s. 33 of The Family Protection Act, 1908 (c. 60 of the Consolidated Statutes of that year). There are numerous decisions, for the most part of the New Zealand courts, in regard to the nature and effect of such legislation. Many of these decisions were reviewed and considered by the Privy Council in *Bosch et al. v. Perpetual Trustee Company, Limited, et al.*, [1938] A.C. 463, [1938] 2 All E.R. 14, [1938] 2 W.W.R. 320. In that case, the Judicial Committee (speaking by Lord Romer) expressed approval of certain principles which had been laid down by Stout C.J. in *In re Allardice, Allardice v. Allardice* (1910), 29 N.Z.L.R. 959—notably of these principles, namely, (1) that the Act is not a statute to empower the Court to make a new will for a testator, and (2) that the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of wife,

husband or children where adequate provision has not been made for this purpose.

The Board also quoted with approval the following remarks of Salmond J. in *In re Allen (Deceased)*, *Allen v. Manchester et al.*, [1922] N.Z.L.R. 218, at p. 220:

“The Act is . . . designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.”

I pass now to the question whether the increase of the widow's annuity ordered to be paid out of the income of the estate of the deceased, and the life interest in the Scarth Road house and furniture secured to her by the order of His Honour Judge Lee under The Dependants' Relief Act (hereinafter, for the sake of brevity, referred to as maintenance allowances) constitute a “succession” or “property passing on death” within the meaning of The Succession Duty Act.

In the first place, it is to be observed that this Act is a taxing statute, and it is a well-settled principle of construction that if the Crown claims a duty thereunder it must show that the duty is imposed by clear and unambiguous words. Judicial tribunals, in interpreting a taxing statute, must adhere to the words of the statute: *Attorney General v. Milne, et al.*, [1914] A.C. 765, at 771-2 and 781. As was said by Collins M.R. in *Attorney-General v. Earl of Selborne*, [1902] 1 K.B. 388, at 396: “ . . . the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by an attempt to construe the statute benevolently in favour of the Crown.”

In my opinion, the widow's maintenance allowances under The Dependants' Relief Act constitute neither a “succession”

nor "property passing on death" within the meaning of The Succession Duty Act.

First, as to succession, I respectfully adopt as a correct statement of the effect of s. 3 of The Succession Duty Act what was said by Hodgins J.A. in *Attorney-General for Ontario v. Baby*, 60 O.L.R. 1, at p. 6, [1927] 1 D.L.R. 1105:

"Now 'succession' is defined in the Act, by sec. 3, as being something which is conferred on a person upon a death, by reason of a past or present disposition of property, or by any devolution by law by reason whereof such person becomes beneficially entitled. These words 'in respect of any succession' therefore mean in respect to something conferred upon a person upon the death of another, arising out of or depending on a disposition of property or on the general law, apart from individual disposition, and designated by the statute as a 'succession'. . . . The words here used seem to denote merely the accession of a title or right in the person benefited, by which a benefit accrues to him."

The term "disposition" extends to all modes of disposition whether by will or by deed or by settlement *inter vivos*: *Attorney-General v. Fitzjohn et al.* (1857), 2 H. & N. 465, 157 E.R. 192, or, as it is stated in Dymond on Death Duties, 8th ed., p. 328:

"By a *disposition* is meant any act, whether *inter vivos* or testamentary, by virtue of which a beneficial interest in property or the income thereof is limited to arise on a death or after an interval from a death."

The same author, discussing the effect of s. 2 of the Imperial Succession Duty Act, 1853, c. 51, (no doubt the prototype of s. 3 of the Ontario Succession Duty Act, which for all material purposes is expressed in the same terms), says (p. 328):

"The three essential characteristics of a succession are—
(a) A disposition or devolution of property. (b) A gratuitous acquisition. (c) A death on which the property or the title is acquired."

In my view, the order of His Honour Judge Lee did not constitute a "disposition" within the meaning of The Succession Duty Act. It is obviously not an act either *inter vivos* or testamentary. The widow, Margaret Ethel Dunn, did not become beneficially entitled to the maintenance allowances granted by the order

upon the death of her husband. The death of her husband was no doubt the event or occasion which gave rise to the jurisdiction of the Surrogate Court Judge to grant her additional maintenance allowances and charge them against the estate of the deceased. But his order did not issue as of right on the part of the applicant; it was a discretionary order, and was made only after a hearing upon which the statute required the learned judge to enquire into and consider the various matters mentioned in s. 7 of The Dependants' Relief Act.

Still less, in my view, did the learned judge's order involve a "devolution by law" to the widow of a beneficial interest in property or the income thereof upon the death of her deceased husband. The term "devolution by law" applies to the case where property devolves to a person by the ordinary rules of legal succession or of right if the law were left to its own course uncontrolled; see *Lord Saltoun v. The Advocate-General* (1860), 3 Macq. H.L. 659, at 660. In *Earl of Zetland v. Lord Advocate* (1878), 3 App. Cas. 505 at p. 520, Lord Selborne said:

"Devolution by law takes place whenever the title is such that an heir takes under it by descent from an 'ancestor,' according to the rules of law applicable to the descent of heritable estates." The widow's title to the maintenance allowances granted to her under The Dependants' Relief Act cannot, therefore, be referred to any "devolution by law" within the meaning of s. 3 of The Succession Duty Act.

It remains, then, to consider whether the maintenance allowances so granted to her can properly be held to constitute "property passing on the death" of her late husband. "Passing" may be taken to mean "changing hands", said Viscount Haldane in *Nevill v. Commissioners of Inland Revenue*, [1924] A.C. 385 at 389, where the House of Lords had under consideration the corresponding expression in s. 1 of the Imperial Finance Act, 1894, c. 30. In *Attorney-General v. Milne et al.*, [1914] A.C. 765 at 779, Lord Parker said:

"The expression 'passing on the death' . . . is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death."

In the same case Lord Dunedin, discussing the meaning of the word "passes" in the Imperial Finance Act, 1894, said, at pp. 774-5-6:

“ . . . the word is here treated as a word of ordinary language; . . . Now, although the word ‘passes’ is what I may call a neutral or vague word, it is so naturally associated with the idea of ‘from’ and ‘to,’ and ‘on the death,’” as to direct “attention to the death of a person who leaves property behind him, . . . a death occurs, and somebody in consequence gets property which he did not have before”.

To the like effect, Lord Macnaghten in *Earl Cowley v. Commissioners of Inland Revenue*, [1899] A.C. 198, said (pp. 210-211):

“ . . . the principle on which the Finance Act 1894 was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes. . . . Sect. 1 gives effect to that principle.”

In *Re Magan*, [1922] 2 Ir. R. 208, Palles C.B. said, at p. 210:

“The two events—death and the passing of property—took place, in point of time, at the moment; but in nature one preceded the other. The passing of the property was the effect of the death; the death was the event upon which it passed, and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognized principle of our law.” The learned Chief Baron then cited passages from Viner’s Abridgement: Title, “Instant”, division “A” and division “B”, a passage from Littleton, s. 287, and a passage from Coke’s commentary thereon. Then he said: “Considering the instant of the death of Miss Magan upon this principle, the instant so far as it was an end of her life must precede in contemplation of law the same instant so far as it was the time at which the estate passed on her death. I am, therefore, of opinion that although the death and the passing of the estate must be regarded as having taken place at the same instant, which for some purposes must be considered the law as ‘*unum indivisibile in tempore*’, still that indivisibility must be considered to be sub modo only, or, I should prefer to say, is subject to an exception, and at all events is not inconsistent with the termination of her estate preceding the passing of that estate upon her death”.

In *In re Jost Estate*, [1942] S.C.R. 54, at p. 69, [1942] 1 D.L.R. 81, at 90, Hudson J. (Duff C.J. and Taschereau J. con-

curring), discussing the corresponding provisions of the Nova Scotia Succession Duty Act, R.S.N.S. 1923, c. 18, said:

“ . . . it would appear quite clear that the tax imposed by the statute is intended to be determined by the state of things existing at the date of death of the deceased.” In the same case in the Court of Appeal, 15 M.P.R. 477, at 496, [1941] 1 D.L.R. 642 at 643, “Property which ‘passes on the death of any person’ means property which changes hands at the death. It vests in the executor though he has no beneficial interest in it: *Re Bennett; Provincial Treasurer v. Bennett*, [1936] 2 D.L.R. 291, 44 Man. R. 63, [1936] 1 W.W.R. 691. It only actually ‘passes’ to the beneficiary when it reaches him. It would be unreasonable and unjust to levy duty in respect of property that the beneficiary never received”.

In the same sense, Roach J. in the recent case of *Re Wagstaff*, [1941] O.R. 71 at 77, [1941] 2 D.L.R. 108, after quoting the relevant provisions of The Ontario Succession Duty Act, said: “Apart therefore from the limited or conditional liability for payment imposed on the executor or trustee by sec. 19 the only person liable for payment is the legatee, etc., under sec. 12, and his liability is limited to the duty on so much of the property as passes to him.

“Now, ‘passes’ means ‘changes hands’” [citing the *Nevill* case *supra*, and *Attorney-General v. Milne et al.*, *supra*]. “It is true that on the death of a person the title to property vested in him and with respect to which he has the power of disposal passes to and becomes vested in his personal representatives by virtue of The Devolution of Estates Act. That passing, however, is not the passing referred to in The Succession Duty Act. The personal representative is merely a trustee. He is the conduit through whom the title passes, or more accurately may pass, to the persons beneficially entitled.”

It seems to follow from these pronouncements that the “passing of property” within the meaning of The Succession Duty Act takes place at the date of the death of the deceased. Therefore, “What passes”, as Rigby L.J. said in *Earl Cowley’s Case*, [1897] 1 Q.B. 355 at 377 “must be ascertained at the moment of passing without reference to any events happening before or afterwards.” If that conclusion be sound, then it clearly follows that the maintenance allowances granted to the widow,

Margaret Ethel Dunn, by the order of His Honour Judge Lee of 2nd January 1934, made under authority of The Dependants' Relief Act, cannot possibly be looked upon as "property passing on the death" of her deceased husband. It is true the order made the increase of her annuity effective as from the date of death of the deceased, but that was a matter entirely within the discretion of the Surrogate Court Judge, who, if he had seen fit to do so, might have fixed any other date as that from which the increase of annuity should become effective.

Support for the soundness of my conclusions on the whole question of "succession" and of "the passing of property on death", as regards these maintenance allowances is, I think, derived from the decision of the First Division of the Court of Session in Scotland in *Lord Advocate v. Jamieson* (1886), 23 Sc. L.R. 510. In that case deeds executed by a truster and his widow created a trust for the payment of debts and conferred no right on the beneficiaries other than a right to the conveyance of the heritage on the termination of the trust. By a private Act of Parliament passed following the death of the truster, immediate pecuniary benefits were secured to the beneficiaries, the duration of the trust being correspondingly extended. It was held that the payments made to the beneficiaries under the authority of the Act of Parliament were not acquired by disposition or devolution within the meaning of The Succession Duty Act, 1853, and were not liable for duty. The Lord President said in part, at p. 513:

"It seems to me therefore that neither the late Lord Belhaven nor Lady Belhaven are in any sense, with reference to these sums of money, the predecessors of the parties who are now sought to be charged, nor can the parties sought to be charged be called their successors. They have not taken one shilling of that money by the will of either the late Lord Belhaven or Lady Belhaven, and the late Lord Belhaven and Lady Belhaven never intended them to take any such sums under their settlement. So that the terms 'predecessor' and 'successor' are entirely inapplicable to what may be called, if indeed it can be aptly called at all, the relation between the parties taking this money and the late Lord and Lady Belhaven. On the other hand, it does not appear to me possible to say that this money has come to the parties now sought to be charged either by dis-

position or by devolution. By devolution, of course, it cannot be, and that is not contended, and if there be a disposition at all, or anything that comes in place of a disposition, it is simply an Act of Parliament, for there is no disposition before us that could in any way have authorized such payments. And to take the Act of Parliament as equivalent to a disposition in a question out of The Succession-Duties Act is certainly a very great novelty, and I think is not an admissible extension of the words of the clause of the statute."

Then Lord Shand said, at p. 514: "The only right which Lady Belhaven conferred by her deed on these gentlemen was that if they survived the point of time at which Lord Belhaven's debts were entirely cleared away from the estates, then they should obtain a conveyance to these heritable estates. So again I say that the sums which are sought to be charged with succession-duty are not taken under the succession of Lady Belhaven because she did not provide that these sums should be paid. Under that right then are they taken? They are taken entirely by virtue of that Act of Parliament which created the right in these sums. That Act of Parliament did not confirm anything that had been done by Lady Belhaven. It no doubt proceeds upon a narrative that some doubts had arisen as to the construction of the deeds. But when we look at the deeds themselves, and have to construe them judicially, there can be no doubt about this point at least, that Lady Belhaven had given no right whatever by way of succession to these two gentlemen so far as regards the sums which they have actually received. Well, then, that being so, there seems to me to be an end of the question. It is quite true that Parliament may have been moved, and undoubtedly was moved, to give these annual payments—a small capital sum and annual payments thereafter—because the gentlemen who got the benefit were the persons who would ultimately take the succession under Lady Belhaven's deed. That was the motive apparently which moved Parliament to sanction the arrangement between the creditors and the ultimate beneficiaries under that deed. But the mere circumstance that they were named in Lady Belhaven's deed as the persons ultimately to get the estates, though it may have induced Parliament to give them those benefits which Parliament thought it right to confer on them, cannot, I think, in any possible view, rear up the enactment which Parliament has passed into

anything having the character of making a testamentary provision under Lady Belhaven's deed. And so holding as I do a clear opinion that this was not a succession under either of the testamentary deeds founded upon, but was a right created and given by the Act of Parliament, I do not think the money can possibly be made subject to succession-duty."

A shorter opinion, to much the same effect, was delivered by Lord Adam.

By parity of reasoning, it cannot be said that the widow, Margaret Ethel Dunn, takes the maintenance allowances granted to her under The Dependants' Relief Act in virtue of any succession or of the passing of property on the death of her husband. Her title, and her only title, to those allowances is the order of the Surrogate Court Judge made under statutory authority.

Two other points were raised, one of which was raised in the notice of appeal and the other merely in argument. The point raised by the notice of appeal was expressed as follows:

"The said life interest in the Scarth Road property and furniture was by the said order of His Honour Judge Lee made upon condition that the widow should pay the municipal taxes, fire insurance and repairs, which, under conditions that have existed since the date of the death of the deceased, have been equivalent to a fair rental value for the said property and, therefore, no value should be placed upon the said life interest in any event."

The other point, which was raised in argument but not in the notice of appeal, was that the effect of the order made by the Surrogate Court Judge under The Dependants' Relief Act was to charge the allowances which he granted to the widow against the estate; that that had effect of creating a debt, and that, that being so, the debt should be deducted from the assets of the estate for succession duty purposes. In view of the conclusions which I have reached upon the other issues raised in the case, I do not propose to express any opinion upon either of these questions.

In the result, the appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for the appellants: Fennell, Porter & Davis, Toronto.

Solicitor for the respondent: L. A. Richards, Toronto.

[URQUHART J.]

Re Brush.

Wills—Construction—Gift to Three Daughters by Name—Not a Class Gift—Effect of Signature of Will by Two Daughters as Witnesses—The Wills Act, R.S.O. 1937, c. 164, s. 16.

A gift of the residue of an estate "equally among my three daughters Lina, Mabel and Beatrice" is a gift to the daughters as individuals, and not a class gift. *Re Hutchinson* (1923), 24 O.W.N. 387, doubted; other authorities reviewed. Where, therefore, two of these daughters sign the will as witnesses, there is an intestacy as to the shares which the testator purported to give to them.

A MOTION for the ascertainment of the beneficiaries of the estate of Silas Brush, deceased, and of their respective shares in the estate. The facts are fully stated in the judgment.

7th November 1942. The motion was heard by URQUHART J. in Court at Windsor.

W. D. Conklin, for the executor, applicant.

W. H. MacLeod, for John Clark, a grandson of the testator.

19th November 1942. URQUHART J.:—Silas Brush, a former resident of Harrow, Ontario, died at Windsor on 25th March 1942. His will was made on the 3rd day of March 1941. From its appearance I would assume that the original will is on a printed form, purchasable at a stationer's. After a direction for the payment of debts, the remaining clauses, except that appointing the applicant (a stranger) as executor, read as follows:

"I GIVE, DEVISE AND BEQUEATH all my Real and Personal Estate of which I may die possessed in the manner following that is to say:

"Equally among my three daughters—Lina, Mabel and Beatrice.

"ALL the residue of my Estate not hereinbefore disposed of I give devise and bequeath unto ."

The deceased was survived by the three daughters named in the will. He had had a fourth daughter who died on 23rd May 1929, before the execution of the will, and this daughter left her surviving a son John Clark.

All of these descendants are over the age of twenty-one years.

Unfortunately, two of the daughters signed the will as witnesses. There are three witnesses to the will and their names appear in the following order: the daughter Mabel, the daughter

Beatrice and one John H. Madill, who, I believe, is a notary public in the town of Harrow where the will was made.

By The Wills Act, R.S.O. 1937, c. 164, s. 16, a gift to a witness is made void, and this rule applies even though there are enough witnesses without the signatory. See *Randfield v. Randfield* (1863), 11 W.R. 847, and *Cozens v. Crout* (1873), 21 W.R. 781.

Unfortunately the residuary clause, although contemplated by the printing, was not completed. The first clause above quoted is in itself the actual residuary clause.

A gift in a residuary clause which fails lapses completely, as there is no place into which it may fall, and in this particular will there would have to be an intestacy as to such gift, unless the gift can be considered a class gift.

"In the case of a gift to a fluctuating class . . . to be ascertained at any particular time, no lapse occurs if a member of the class dies antecedently to such time, the class being automatically contracted. Similarly when a member of the class is precluded from participation expressly by exception or revocation, or by his attesting the will, there is no lapse and the property is divided among those members who are capable of taking." 34 Halsbury, 2nd ed., p. 142, citing, *inter alia*, *Fell et al. v. Biddolph et al.* (1875), L.R. 10 C.P. 701.

Had it not been for a judgment of Mowat J. in *Re Hutchinson* (1923), 24 O.W.N. 387, a case which is as nearly similar to this one as is possible in will cases (a most unusual circumstance), I would have had little hesitation in deciding the question herein without considering it further. The whole will in that case does not appear either in the report or in the Court papers. What was before the Court is merely an extract appearing in the affidavit in support of the motion for interpretation.

The testator devised and bequeathed all his real and personal estate to his executors, naming them, in trust for the following purposes:

"Firstly, to pay my just debts, funeral and testamentary expenses, and thereafter in trust to dispose of and pay over or convey the same to the person or persons or corporations hereinafter named as follows:—All my real estate consisting of the following . . . [here followed a description]. Also any cash that may be to my credit I convey to my wife Agnes to be used

for her maintenance during life & on her decease to be equally divided among my children viz. Jennie, Bella & Ralph—should any of my heirs pre-decease my wife Agnes, their share of the estate shall be divided equally among his or her children.

“All the rest and residue of my Estate I devise and bequeath to
”.

All children survived the testator, but the husbands of the two daughters, who were also executors, subscribed the will as witnesses. The deceased left no money or personal estate, his whole estate consisting of a residence and vacant lots. He also left certain small debts, and also the taxes on some at least of the real estate were in arrears.

The only substantial difference between that will and the one under consideration herein is the inclusion in the latter of the word “three”, as referring to daughters, unless the use of the word “heirs” in the former makes a difference. It seems to me, however, that the use of the word “heirs” does not alter the intention but that it is used in the sense of “my aforesaid children.” It does not appear from the papers whether Jennie, Bella and Ralph were all the children the testator had, but I assume that that was the fact.

The will, it is apparent, was written on a somewhat similar form as that in the present case, with the clause intended for the disposal of the residue uncompleted. Mowat J. held that the gift was to a class, *i.e.*, to the testator’s children, and as the gifts to Jennie and Bella were void, there was a forfeiture as to them, and the one remaining member of the class took all. He referred to *In re Harvey’s Estate; Harvey v. Gillow*, [1893] 1 Ch. 567, in support of this conclusion. In that case, however, it is quite clear that the gift was a general one to children, with a gift over to other children, and as the intention of the testator to create a class gift was clear, it was held that it did not matter if there turned out to be only one left in the class.

Notwithstanding this decision, which appears to be out of harmony with the cases generally, I cannot see that the gift in the present will is a gift to a class; it appears rather to be a gift to individuals designated.

In *Bolton v. Bailey* (1879), 26 Gr. 361, the ultimate beneficiaries were described as the testator’s nephew George Bailey “and . . . the following . . . of my” brother’s children (naming

them) "equally . . . ; and in the event of any of my legatees dying before getting their share or portion as aforesaid leaving child or children", then such would inherit. Proudfoot V.C., at p. 365, quotes with approval Jarman's definition: "... a gift to a class as a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take equally, the share of each being dependent for its amount upon the ultimate number of persons".

Then follows a reference to *Re Stanhope's Trusts* (1859), 27 Beav. 201, 54 E.R. 78, where, he said, the Master of the Rolls had held that a gift in trust for five daughters, naming them, and their issue, was not a gift to a class.

The Vice Chancellor, at p. 366, goes on to hold that, the legacy to one of the nephews (a son of the brother) having lapsed, and there being no residuary clause, there was an intestacy to that extent and his share went to the next of kin of the testator.

The case of *Re Stanhope's Trusts*, however, is somewhat different in its facts. There the testator, having five daughters, gave a legacy to one, and the residue to the remaining four by name, and their issue, but he afterwards provided that any subsequently-born daughters and their issue should be entitled to equal shares with the four daughters named. One of the four died without issue in the lifetime of the testator. It was held that there was no intestacy as the daughters took as a class, those who survived taking absolutely. That case seems to me to be a case of a true class gift, because the class is left indefinite and capable of being enlarged.

Romilly M.R., at p. 203, said: "I think this a gift to a class, though in my opinion it is not a very clear case. If it had been a gift in trust for these four daughters, 'Harriet, Maria, Charlotte and Amelia, by name, and their issue,' and it had stopped there, I should have been clearly of opinion that it was not given to a class. Stopping there it is a gift to four persons, and if any had died in the life of the testator without issue, there would have been a lapse of her share, which would have gone to the testator's next of kin."

Bolton v. Bailey was preceded in Grant's reports by *McIntosh v. The Ontario Bank* (1872), 19 Gr. 155. In that case interpretation of the will came up incidentally, the point at issue being constructive notice on the part of the Bank of the contents of the will. However, in the course of the decision, the will of the testator had to be interpreted. There the testator gave certain property to each of five sons. Then he gave the residue to be "equally divided amongst my five sons above mentioned". One son predeceased the testator, and there is no indication how many sons the man had.

Spragge C., at p. 163, said: "My opinion is, that the devise of the residue, by the will of the testator . . . was not a devise to a class, but to the five sons named in the will;" and the share of the one lapsed and was undisposed of by the will.

This decision seems to be in accordance with the general principle above quoted, but unfortunately no authorities are cited in support of the particular interpretation. However, it might be distinguishable on the ground of greater individuality of devisees, and because it was not clear whether the testator had other sons.

In re Shannon (1909), 19 O.L.R. 39, was cited as being favourable to the contention of the grandson that in the present case there is an intestacy in respect of two-thirds of the estate. In that case there was a gift to the executor to sell and divide in equal shares among the testator's children, eight in number and named in the will. In regard to the share of a daughter Edith, there were certain conditions, very involved in their nature. She predeceased the testator. It seems to have been agreed rather than decided that this was not a class gift but rather a gift of parts to individuals. There is no question, however, that it would not be a class gift, because of the special provisions in regard to Edith's share.

Another case where special provisions took the bequest out of the class category was *Re James* (1919), 16 O.W.N. 87.

The subject, therefore, is not free from difficulty. In 34 Halsbury, 2nd ed., at p. 143, it is said:

"*Prima facie* a class gift is a gift to a class of persons included or comprehended under some general description and

bearing a certain relation to the testator or another person. Thus, where a testator divides his residue into as many equal shares as he shall have children surviving him, or predeceasing him leaving issue, and gives a share to or in trust for each such child, the gift is to a class."

In re Dunster; Brown v. Heywood, [1909] 1 Ch. 103, is cited, but in that case the direction was given to trustees to divide into as many shares as there should be people of the above description surviving the testator. He, however, by codicil revoked the share to go to one daughter, but it was held that it was still a class gift and there was no lapse, the residue going to the remaining daughters. The case appears to me to be a clear example of a class gift.

Halsbury goes on to say, at pp. 144-5: "Gifts to persons described only by relationship are sometimes construed as class gifts, and sometimes as gifts to individuals. A gift may be nonetheless a gift to a class because some of the members are referred to by name, or because a person . . . is excluded by name. . . . On the other hand, a gift to an individual and the children of another individual is not regarded as a class gift, unless there is something in the context to show that the testator intended to form a class".

Such a case is *Kingsbury v. Walter et al.*, [1901] A.C. 187, which was much quoted in argument, but the decision in which is peculiar to its own facts. There, the intention of the testator was clearly to make one class of his nephews and nieces. It might be noted that the trial judge thought to the contrary.

Then at p. 145 the author of Halsbury goes on to say: ". . . gifts to several persons designated by name or number or by reference are not class gifts, and are liable to lapse".

A somewhat similar statement is made in Theobald on Wills, 9th ed., p. 670: "A gift 'to the five daughters of A.,' or to 'my nine children,' or to 'my said three sisters,' is not a gift to a class."

It seems to me quite obvious that gifts so expressed do not come within the definition cited above by Proudfoot V.C. Two of the cases cited in support of this proposition are useful.

In *In re Smith's Trusts* (1878), 9 Ch. D. 117, the residue of an estate was to be divided between the five daughters of a certain couple for their use after the death of one Caroline Smith, she leaving no children. On the date of the will this couple had five children, but two predeceased the testator. It was held that this was not a class gift, for if the couple had had another child, such child would not have shared, because the bequest was limited to the five children. It was held to be a gift to designated persons.

The second case is that of *In Re Stansfield; Stansfield v. Stansfield* (1880), 15 Ch. D. 84, where it was held that a devise to be equally divided "between my nine children" was a gift to the testator's nine children as persons designated. In this case, however, there is a contrast of wording between this provision and that of the residue, which provided for a division between "all my children" with a special deduction from the share of one.

Having regard to the above authorities, it seems to me that the testator in our case, in planning his will, had not in mind his three daughters as a class. If he had, he would have merely said "I give . . . to my daughters share and share alike," or something of that sort. In my opinion he had in his mind the three daughters as individuals, and the provision for them is the same as if he had said "I give to Lina, Mabel and Beatrice, who are my three daughters".

This case satisfies two of the exceptions to the class rule, namely, that the number of beneficiaries is given and that the names of such are given.

The fact that the number is given would make the case stronger than the *Hutchinson* case, *supra*, but I should hesitate to distinguish that case on that ground if I did not feel that that case, which may depend on its own facts and circumstances, is out of harmony with the cases and with the general principles which distinguish class gifts.

I must therefore hold that the gift in the will was not a class gift, but was a gift to the three daughters individually. There is, therefore, a lapse and an intestacy in respect of two-thirds of the estate. The daughter Lina, who did not sign, will receive her one-third of the residuary estate as provided by the will,

and in addition one-quarter of two-thirds, or one-half of the estate in all. Each of the other daughters and the grandson will receive a one-sixth share of the residue.

Order accordingly, costs of both parties out of the estate, those of the executor as between solicitor and client.

Order accordingly.

Solicitors for the executor: Goodeve & Conklin, Kingsville.

Solicitor for John Clark: W. H. MacLeod, Windsor.

[COURT OF APPEAL.]

Re Stutchbury and The City of Toronto.

Easements—Right of Way—Way of Necessity—Implied Grant—Conditions of Existence—The Registry Act, R.S.O. 1937, c. 170, s. 75.

Taxation—Municipal Tax Sale—What Rights Acquired by Purchaser—No Possibility of Way by Necessity—Municipality Not Grantor—The Assessment Act, R.S.O. 1937, c. 272, ss. 15, 175, 181.

W. was the owner of a block of land, abutting, on its westerly side, on L. Ave. She subdivided this block, and then sold the westerly portion of each of the lots, retaining the easterly portion, hereafter referred to as Block A. Between Block A and Yonge St. was land owned by the municipality. Block A was sold for taxes, and S. became the purchaser at the tax sale. S., claiming that her parcel was "land-locked" applied, under The Vendors and Purchasers Act, R.S.O. 1937, c. 168, for a declaration that she was entitled to a right of way over the City-owned property to Yonge St.

Held, the motion must fail, on the following grounds:

(1) S. had failed to show that she had no other means of access to or egress from her lands. A way of necessity arose, not only in favour of a purchaser over the lands of his vendor, but also in the converse case, in favour of a vendor over the land sold, where that land afforded the only access to land retained by the vendor. *Howton v. Frearson* (1798), 8 T.R. 50, 101 E.R. 1261, referred to. S. had not established that no such right of way had arisen by necessity in favour of W. at the time of the original sale, and the onus was on her in this respect. If such a way of necessity had existed, it would have passed to S., since it was not such an "interest affecting land" as would be extinguished under s. 75 of The Registry Act, R.S.O. 1937, c. 170. *Israel v. Leith* (1890), 20 O.R. 361, referred to.

(2) At a sale of land for taxes, the purchaser acquired only what was expressly provided in The Assessment Act, R.S.O. 1937, c. 272, s. 15(1) of which was particularly important in this connection. The land purchased by S. was not, at the time of sale, a dominant tenement in relation to the City's land adjoining, and the easement now claimed did not come within the subsection.

(3) A municipality, in effecting a tax sale, was not a "grantor", so as to give rise to the doctrine of a way by necessity. No title to the lands was vested in the municipality. While the municipal officers, in making the sale and executing the tax-deed, might be considered officers and, in a sense agents, of the corporation, their power to convey was derived from the Act, and the corporation could give them no other authority. A way of necessity arose only from an implied grant, and therefore only where such a grant could be implied, and there was no warrant for the assumption that the municipal officers, carrying out their duties under the Act, could grant to a purchaser a right of way over other lands vested in the corporation.

Quaere, whether s. 3 of The Vendors and Purchasers Act authorized an application of this nature.

AN appeal by the City of Toronto from the order of Makins J., made under s. 3 of The Vendors and Purchasers Act, R.S.O. 1937, c. 168, declaring the respondent entitled to a right of way over lands of the appellant. The facts are fully stated in the judgment.

6th November 1942. The appeal was heard by ROBERTSON C.J.O. and MIDDLETON and GILLANDERS JJ.A.

F. A. A. Campbell, K.C., for the appellant: The result of the sale by Annie E. Welch of the Lorindale Avenue frontage, and the retaining of the inside parcel, was that she enjoyed a way of necessity to Lorindale Avenue over the lands sold. *Armour on Real Property*, 2nd ed., pp. 31-32. This right of way so appurtenant to the inside parcel would pass to the respondent at the tax sale without special mention or description. The Assessment Act, R.S.O. 1937, c. 272, s. 15; The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 14. It follows that the respondent's parcel is not land-locked so as to entitle her to a way of necessity across the lands of the City. [ROBERTSON C.J.O.: Does the respondent say that she has no right of way to Lorindale Avenue?] That is the effect of her affidavit.

Neither the City nor its treasurer sold this parcel of land to the respondent. A tax sale is not an ordinary sale. The treasurer is simply carrying out his statutory duties, and there is no sale or contract for sale within the meaning of s. 3 of The Vendors and Purchasers Act, R.S.O. 1937, c. 168, and this application is misconceived. The effect of the tax sale was merely to vest in the respondent the estate held by the previous owner, this being effected by the machinery set up by The Assessment Act, particularly s. 181. [ROBERTSON C.J.O.: In fact there was never any conveyance to the City.] No; therefore the City does not give a deed to lands purchased at a tax sale; the document is more in the nature of a certificate.

The City could only grant a right of way by by-law, and therefore there can be no implied grant. The Municipal Act, R.S.O. 1937, c. 266, s. 267(1); *John Mackay and Company v. The City of Toronto*, [1920] A.C. 208, 48 D.L.R. 151, [1919] 3 W.W.R. 253; *The City of Toronto v. Prince et al.*, [1934] S.C.R. 414, [1934] 3 D.L.R. 81.

E. C. Fetzer, for the respondent: In the Court below it was admitted that this parcel was completely land-locked, and the judgment was given on this basis. A way of necessity would therefore arise. It was clear from ss. 73, 74 and 75 of The Registry Act, R.S.O. 1937, c. 170, that the tax deed could not give a right of way to Lorindale Avenue: *Ross v. Hunter* (1882), 7 S.C.R. 289 at 318.

A right of way over the City's adjoining lands arises both by implication and by virtue of the word "appurtenances" in s. 14 of The Conveyancing and Law of Property Act, R.S.O. 1937,

c. 152. The respondent could not assert a right of way over the Lorindale Avenue lands, as against innocent purchasers, without notice to them, she being subsequent to them: *Israel v. Leith* (1890), 20 O.R. 361.

The City is the grantor of the lands. The treasurer is in the same position as was formerly the sheriff. He is a statutory officer empowered to conduct a sale: The Assessment Act, ss. 99, 152, and others [ROBERTSON C.J.O.: The City has no title; it has a right to sell but no ownership—a purely statutory power of sale. The case of a mortgagee is different; he has the legal estate.] The City has a lien, surely that is analogous to the right of a mortgagee. I refer to *Town of Sturgeon Falls v. Imperial Land Co.* (1914), 31 O.L.R. 62, 20 D.L.R. 718, [ROBERTSON C.J.O.: The treasurer is not a grantor in the sense that he sells a title which he has in himself. A lien is not an estate—there is no right to possession.] The City has a right to distrain. [ROBERTSON C.J.O.: But that is a statutory right only.] The City is referred to constantly in The Assessment Act as the seller of the land—see s. 156(2).

For a case in which the purchaser of land from a municipal corporation was held entitled to a right of way over other lands of the municipality, see *Corporation of London v. Riggs* (1880), 13 Ch. D. 798 at 806. [ROBERTSON C.J.O.: But that was a case where there was an actual deed from the City.]

I refer also to *Briggs v. Semmens et al.* (1890), 19 O.R. 522; *Carter v. Grasett* (1888), 14 O.A.R. 685; Stroud, *Law of Easements*, pp. 43, 44; Goddard on Easements, 8th ed., p. 36; *Town of Sturgeon Falls v. Imperial Land Co.*, *supra*.

F. A. A. Campbell, K.C., in reply.

Cur. adv. vult.

17th November 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal by the municipality from the order of Makins J., dated 8th July 1942, whereby it was declared that Hester Stutchbury, who had purchased certain lands in the city of Toronto at a tax-sale, is entitled to a way of ingress and egress to and from the said lands to Yonge St. over certain lands of the municipality. The matter was brought before the Court by way of motion under The Vendors and Purchasers Act, R.S.O. 1937, c. 168.

The lands sold for taxes had belonged to one Annie E. Welch, and were part of a larger block of land at one time owned by her, which had been subdivided into lots. All the lots abut on the east side of Lorindale Avenue, which is the first street west of Yonge St. running north from Lawrence Avenue. None of the lots abut on any other highway. Annie E. Welch sold off the westerly part of all the lots, retaining the easterly part of each lot. The parts of the several lots so retained make up the parcel of land purchased by respondent at the tax-sale.

Respondent alleges that the parcel she purchased is land-locked and wholly without means of ingress or egress. The municipal corporation happens to own a parcel of land that lies between respondent's parcel and Yonge St., which it acquired by tax-deed in 1935. It is not suggested that this parcel was owned at any time by Annie E. Welch, or that she had any right-of-way across it to Yonge St., or to any street. Respondent claims, however, that on her purchase of this land-locked parcel at the tax-sale she became entitled, by implication of law, to a way of necessity over appellant's adjoining parcel, to Yonge Street. The order appealed from declares that she is so entitled.

It has been long settled, and is not disputed here, that the law implies a right-of-way over the land of the grantor in favour of his grantee, where that is the only means by which the grantee can obtain access to the land granted to him. Appellant does, however, dispute the application of that rule to this case. Appellant says that it was not the grantor of the land purchased by respondent for arrears of taxes. It contends further that the purchaser at a sale for taxes acquires no more than the land that was taxed and such easements (if any) as were appurtenant to it. Preliminary to all its other contentions, however, appellant says that respondent has not shown that she had no other means of access to the land she bought.

The rule of law upon which respondent's case is rested is a rule that works both ways. A way of necessity arises by implication not only in favour of a purchaser of a land-locked parcel; it also arises by implication in favour of a vendor over the land he has sold where the land that is sold affords the only access to land that the vendor retains. As it is put in the headnote to *Howton v. Frearson* (1798), 8 T.R. 50, 101 E.R. 1261: " . . . if the owner of two closes, having no way to

one of them but over the other, part with the latter without reserving the way, it will be reserved to him by operation of law." If, therefore, when Annie E. Welch sold the frontage on Lorindale Ave. she was left without any other means of access to the parts of lots that she retained, and of which the respondent has now become the purchaser, she would become entitled by implication of law to a way of necessity over the land she had sold. Respondent's counsel does not dispute that proposition. His answer to it is that, granting that Annie E. Welch did become so entitled to a way of necessity to Lorindale Ave., she lost it by the operation of The Registry Act (R.S.O. 1937, c. 170), when her grantees registered their conveyances. He refers particularly to s. 75 of The Registry Act, which is as follows:—

"75. No equitable lien, charge or interest affecting land shall be valid, as against a registered instrument executed by the same person, his heirs or assigns, and tacking shall not be allowed in any case to prevail against the provisions of this Act."

I do not think that section has any application to such an "interest affecting land" as is assumed to have been vested in Annie E. Welch as a way of necessity. It was not an equitable right or interest, and while s. 75 no doubt applies to equitable liens, charges or interests affecting land that are not created or evidenced by writing, and are, therefore, incapable of registration, in which respect an implied right-of-way resembles them, the section applies only where the lien, charge or interest is equitable in its nature. *Israel v. Leith* (1890), 20 O.R. 361.

None of the owners of the Lorindale Ave. frontages are before us in this matter, nor is there evidence on the record of the facts and circumstances attending the disposal by Annie E. Welch of that property, nor of the time or times when it was disposed of, nor of its use and occupation since. It is, therefore, impossible to make any finding upon this application that at the time of the tax-sale there was appurtenant to the land respondent then purchased a right-of-way to Lorindale Avenue over the front part of any of the lots that had been sold by Annie E. Welch. I think, however, that it was incumbent upon the respondent to establish that Annie E. Welch did not have any such means of access to the lands that she retained, that passed on the tax-sale to respondent under s. 15

of The Assessment Act. The facts in evidence are consistent with the contrary. The basis of respondent's application is that she has no means of ingress to or egress from the lands she bought at the tax-sale unless she is allowed a way of necessity over appellant's adjoining land, and, in my opinion, appellant's point is well taken and respondent's application fails upon that ground at the outset.

I am further of the opinion that on a sale of land for taxes a purchaser acquires only what The Assessment Act provides. The sale is made under the authority of that statute and that authority alone. S. 181 provides a form of tax-deed, which is required to describe the lands sold at the tax-sale according to the provisions of s. 175, and is declared to have the effect of vesting the land so described in the purchaser, his heirs or assigns or legal representatives, in fee simple, or otherwise according to the nature of the estate or interest sold. S. 15 makes express provision as to easements. Subs. 1 provides what easements shall pass to the purchaser, and is as follows:—

“Where land sold for arrears of taxes was a dominant tenement at the time of sale and was so sold after the 3rd day of April, 1930, the easements appurtenant thereto shall be deemed to have passed to the purchaser.”

The land purchased by respondent was not “at the time of sale” a dominant tenement in relation to appellant's land adjoining, and the easement now claimed does not come within the subsection.

I am further of the opinion that appellant was not the grantor of the lands that respondent acquired at the tax-sale. No title to these lands was vested in the municipality. The Assessment Act creates a lien for unpaid taxes in favour of the municipality, and provides for the enforcement of that lien by sale in the manner prescribed by the Act. While the municipal officers who, by the Act, are authorized to execute the tax-deed, may be considered, in making the sale and in executing the tax-deed, as officers, and in a sense the agents, of the corporation (*Langdon v. Holtyrex Gold Mines Limited et al.*, [1937] S.C.R. 334, [1937] 2 D.L.R. 364), their power to convey the lands that have been sold is derived from The Assessment Act. The corporation can give them no other authority to sell and convey, as might be the case if some title to the lands was vested in it, and it in no way purports to do so. The tax-deed is ex-

pressly made in pursuance of The Assessment Act. A way of necessity arises from implied grant, and can arise only where such a grant can be implied (*Pomfret v. Ricroft* (1669), 1 Wms. Saund., 6th ed. at 323a, note (6), 85 E.R. at 461). There is no warrant for the assumption that the municipal officers carrying out their duties under The Assessment Act could grant to the purchaser of lands sold for taxes a right-of-way over other lands vested in the corporation.

The interests of justice do not call for any intervention to assist the respondent. She purchased the parcel of land in question at the tax-sale for \$32.37. According to her own contention there was no means of ingress to or egress from this parcel to any public highway when she purchased. She now desires to secure, without further outlay, a right-of-way over the lands of the corporation to one of its main highways,—a right-of-way which would enhance the value of the land she purchased and depreciate substantially the City's land made subject to the right-of-way. For what purposes this right-of-way is to be enjoyed is not defined, nor limited in any way, yet it has been held that a way of necessity is to be limited to such uses as were made of the parcel granted at the time of the grant (*Corporation of London v. Riggs* (1880), 13 Ch. D. 798). In view of respondent's contention that the parcel granted to her was not put to any use, nor capable of being used at the time she purchased it, because of the want of any means of access, is she to have a right-of-way over appellant's Yonge St. property, to be enjoyed by her for any purpose whatsoever to which she may see fit to put the land purchased at the tax-sale for \$32.37? I can see no ground upon which respondent is entitled to the order in appeal, and there are substantial grounds for holding that she is not. She must be left to find a means of access to the lands she bought in some other way.

I do not think we should part with the case without expressing our doubt whether respondent's application comes within s. 3 of The Vendors and Purchasers Act, R.S.O. 1937, c. 168. The matter was, however, not argued and it is unnecessary to decide it.

The appeal should be allowed with costs, and respondent's application dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: C. M. Colquhoun, Toronto.

Solicitor for the respondent: Ernest C. Fetzner, Toronto.

[COURT OF APPEAL.]

Parker v. Cowan et al.

Motor Vehicles—Negligence—Safety Zone Established by Municipality—Rate of Speed in Passing—No Street Car Standing at Safety Zone—The Highway Traffic Act, R.S.O. 1937, c. 288, s. 42(1)—The Municipal Act, R.S.O. 1937, c. 266, s. 407(48).

The proviso to s. 42(1) of The Highway Traffic Act, R.S.O. 1937, c. 288, requiring that no motor vehicle, etc., shall pass a safety zone established by the municipality under s. 407(48) of The Municipal Act, R.S.O. 1937, c. 266, at a speed greater than fifteen miles per hour, is not limited in its application to times when a street car is standing opposite the safety zone, but is a general prohibition. The Court has no right to restrict the plain meaning of the Legislature's language, unless that is necessary to give effect to its intention, and the interpretation of the proviso according to its plain and ordinary meaning is neither so in conflict with what may reasonably have been the intention of the Legislature, nor so inconsistent with, or foreign to, other provisions of the Act, as to afford ground for a judicial interpretation which might well amount to legislation.

AN appeal by the defendants from the judgment of Henderson J.A., after the trial of the action before him and a jury. The facts are fully stated in the judgment.

16th November 1942. The appeal was heard by ROBERTSON C.J.O. and FISHER and GILLANDERS JJ.A.

Grey Hamilton, K.C., for the defendants, appellants: It is necessary to consider that The Highway Traffic Act, R.S.O. 1937, c. 288, is divided into parts as it was in 1927. Part VII, which contains the section relevant to this case (s. 42), is entitled: "Rules of the Road". Before 1928 this section made no reference to speed, but in 1928 the proviso was added which is now part of s. 42(1). Between 1923 and 1928, there appeared safety zones, which made the amendment necessary. [ROBERTSON C.J.O.: The Municipal Act, R.S.O. 1937, c. 266, s. 407(48), makes no mention of speed.] It would seem that the true intent of the proviso is that when there is a safety zone a motorist may pass at 15 miles per hour if the street car is stationary. There does not seem to be any ambiguity in the ordinary sense. [FISHER J.A.: The proviso refers to a speed which is "reasonable and proper"—this motorist proceeding west on St. Clair Avenue, did the defendant drive reasonably and properly within the meaning of the section?] [ROBERTSON C.J.O.: The trial judge did not put it to the jury whether it was reasonable and proper.] The learned trial Judge did stress that s. 42(1) was applicable, and that it prescribed a maximum speed of 15 miles per hour for a motor vehicle passing a safety zone. We

submit that the subsection deals only with passing a safety zone when the standing street car is taking on or discharging passengers. In our case no street car is involved. S. 26 of the Act deals with speed limits. There is no quarrel with what the trial judge said if the statute was not wrongly interpreted. It is submitted that the section must be considered as a whole; one cannot divide it into parts and analyze them separately—the section should be looked at in its entirety. [ROBERTSON C.J.O.: Is it not necessary to prove to the Court that the words of the section cannot be read plainly as they stand?] In that event, a motorist would be forced to reduce his maximum speed as allowed in s. 26(1). [FISHER J.A.: Apart from the statute, did the motorist, seeing a man standing on the safety island, behave reasonably?] That is a matter for the jury. The trial judge charged the jury that the defendant driver was exceeding the speed limit. Does that make the charge faulty, and were the jury influenced by the charge in making their decision? [GILLANDERS J.A.: There does not appear to be any provision regarding a motorist's speed in passing a street car.] No. If a safety zone is provided, the motorist may pass a street car, if he exercises reasonable and proper care for the safety of pedestrians. Presumably the Legislature did not intend to alter the law substantially, except as clearly stated or implied, and surely it did not intend to go beyond the immediate scope and object of the section itself. The wording of the whole section relates back to a standing street car. [ROBERTSON C.J.O.: S. 407(48) of The Municipal Act covers safety zones, and does not specify standing street cars.] The words were used there in the same sense. There is ambiguity in s. 42(1), but not in any one word. [ROBERTSON C.J.O.: It was necessary to mention safety zones in s. 42(1) in order that they might be excluded.] The words “where a street car is stationary for the purpose of taking on passengers” could and should have been put in; however, one must have regard to the whole context to glean the true meaning thereof. [ROBERTSON C.J.O.: If you intended to say what the statute does say, you would leave it exactly as it stands.] Unless the Court gives effect to the appellants' argument on that point, it is useless to continue. There is an ambiguity in the proviso, and the intent is certainly not clearly expressed. I refer to *Yorkshire and Pacific Securities Ltd. v. Fiorenza*, [1938] 1 W.W.R. 390

at 397, 52 B.C.R. 509; *M. v. Law Society of Alberta*, [1940] 3 W.W.R. 600 at 611, [1941] 1 D.L.R. 213; *Curtis v. Stovis* (1889), 22 Q.B.D. at 513; *Baumwoll Manufactur von Carl Scheibler v. Furness*, [1893] A.C. 8 at 20; *Le Bar v. Barber and Clarke*, 52 O.L.R. 299 at 303, [1923] 3 D.L.R. 1147; *Maxwell on Statutes*, 5th ed., pp. 33, 47, 132, 372, 410 and 445; 8th ed., pp. 1, 20, 26, 48, 73, 202, 220, 221, 289.

D. J. Walker, for the respondent: It was made clear by the learned trial judge that the jury must consider speed as a contributory cause of this accident. [ROBERTSON C.J.O.: You must prove first that the speed was wrong, and that it was this wrongful speed which caused the accident, or you are not helped at all.] Speed, not a breach of the statute, caused this accident. The first part of s. 42(1) deals with the safety of passengers getting on or off street cars. The proviso deals with matters of an entirely different nature—the safety of pedestrians in all circumstances. The appellants' counsel suggests there should be an entirely new section. While the latter part of this subs. 1 is in the form of a proviso, it may well be considered in itself as a substantive enactment, and not merely a qualification of the part of the subsection which precedes it, as for example in *Rhondda Urban District Council v. Taff Vale Railway Company*, [1909] A.C. 253 at 258.

It is clearly stated in the proviso that "this subsection shall not apply where a safety zone has been set aside", and then regulations are prescribed to govern vehicular traffic passing such safety zones. The use of the words "such safety zone" cannot be construed to mean only one at which there is a stationary street car. If the words of the statute are clear and precise, they should be accepted in their ordinary intelligible meaning: *Worthington v. Robbins and Cadigan*, 56 O.L.R. 285 at 287, [1925] 2 D.L.R. 80. Where the language of a statute is plain, the Court cannot add to it or delete from it. In the whole of The Highway Traffic Act there is no other section or subsection which refers to safety zones; therefore it is difficult to understand the argument of the appellants that this subsection could be absurd or ridiculous as related to anything else in The Highway Traffic Act. Disregarding the first part of the subsection, the proviso is an entirely new enactment which includes every possible circumstance. It is vitally important to remember that the first part of the subsection deals with "pas-

sengers" and in the second part the legislation refers to "pedestrians". The Legislature undoubtedly intended that the wider connotation of the word "pedestrian" should prevail: *Guardians of the Parish of Brighton v. Union Guardians of the Strand*, [1891] 2 Q.B. 156 at 167. If the Court limited the operation of the proviso to those safety zones at which there are stationary street cars, it would not be interpreting the words of the proviso in their ordinary plain meaning, and the intention of the Legislature would be defeated, since the phraseology of the proviso was deliberately changed from that of the first part of the subsection. Certainly, there was no substantial wrong done to the defendant, nor was there any miscarriage of justice.

Grey Hamilton, K.C., in reply.

Cur. adv. vult.

20th November 1942. The judgment of the Court was delivered by

ROBERTSON C.J.O.:—This is an appeal from the judgment of Henderson J.A. sitting as a trial judge, with a jury, at the Toronto assizes. The judgment is dated 15th September 1942, and awards the plaintiff \$6,750 damages and costs. The action arose out of a motor vehicle accident on St. Clair Avenue, in Toronto.

The municipal corporation has established safety zones on St. Clair Avenue under what is now para. 48 of s. 407 of The Municipal Act, R.S.O. 1937, c. 266. Each safety zone is of concrete raised 6 inches above the general level of the pavement. There are two sets of street railway tracks in the centre of the highway, the northerly set of tracks being for west-bound traffic and the southerly set of tracks for east-bound traffic. The rails are set in the pavement, which is there open as elsewhere to ordinary vehicular traffic except as interrupted by street car traffic. Anyone desiring to cross St. Clair Avenue at this point, from north to south, as the respondent set out to do, on leaving the north sidewalk would cross first a pavement 19 feet wide that carries west-bound vehicular traffic. He then reaches the safety zone on the north side of the street railway tracks. On crossing the street railway tracks there is another safety zone, and beyond it a pavement 19 feet wide for east-bound vehicular traffic, and then a sidewalk on the south side of the street.

The respondent, having crossed from the sidewalk on the north side of St. Clair Avenue to the safety zone on the north side of the street railway tracks, stood there for a moment while he looked in both directions for approaching traffic along that part of the pavement on which the street railway tracks are laid. Seeing nothing, he stepped from the safety zone on to the pavement, intending to continue southerly across the street railway tracks to the safety zone on the south side. Almost instantly he was struck by the motor-car of the appellant, Jean Cowan, driven by her husband, the defendant Walter B. Cowan, and travelling in a westerly direction. The respondent was severely injured.

The jury found that the appellants had not satisfied them that the respondent's injuries did not arise from negligence or improper conduct on the part of the appellants. They also found negligence on the part of the respondent causing or contributing to his injuries, and they specified as such negligence the failure to use sufficient caution on leaving the safety zone referred to as the north safety zone, at Nairn and St. Clair Avenues. The fault was apportioned 90 per cent. to appellants and 10 per cent. to respondent.

The appeal turns largely upon the interpretation of subs. 1 of s. 42 of The Highway Traffic Act, R.S.O. 1937, c. 288, which is as follows:

"Where a person travelling or being upon a highway in charge of a vehicle, or on a bicycle or tricycle, or on horseback or leading a horse, overtakes a street car or a car of an electric railway, operated in or near the centre of the travelled portion of the highway which is stationary for the purpose of taking on or discharging passengers, he shall not pass the car or approach nearer than six feet measured back from the rear or front entrance or exit, as the case may be, of the car on the side of which passengers are getting on or off until such passengers have got on or got off safely to the side of the street, as the case may be; provided, however, that this subsection shall not apply where a safety zone has been set aside and designated by a by-law passed under the provisions of paragraph 48 of section 407 of *The Municipal Act*, but no vehicle or horse shall pass such safety zone at a speed greater than is reasonable and proper and in no event greater than fifteen miles per hour and with due caution for the safety of pedestrians."

There was evidence that the appellant driver was travelling at 23 miles per hour as he passed the safety zone in question, and the trial judge instructed the jury that this speed is more than the statute permits, but that the jury must go further to hold appellants responsible, and must find that driving at that speed caused or contributed to respondent's injuries. This direction of the learned trial judge was objected to by counsel for appellants, who submitted that the limitation placed by the statute on the rate of speed at which a vehicle or horse is permitted to pass a safety zone applies only when the vehicle or horse is passing a street car which is stationary for the purpose of taking on or discharging passengers. It is admitted that at the time of this accident there was no stationary street car at the safety zone, nor was there a street car in close proximity.

Appellants concede that the language in which the proviso to subs. 1 of s. 42 is expressed is plain and unambiguous, but the contention is that to place a literal interpretation upon the proviso ignores the clear intention of the Legislature. Appellants say that to give effect to the true intention of the enactment it is necessary to supply words that are not in it, so that the restriction as to speed shall apply only when a vehicle or horse is passing a safety zone at which there is a stationary street car taking on or discharging passengers. Various suggestions are made as to where appropriate words should be read into the proviso so that the statute may say expressly what counsel argues the Legislature intended.

The basis of appellants' argument is the assumption that the particular purpose of the Legislature in enacting the proviso (which was not added until some years after the first part of the subsection had been enacted) was to protect persons getting on or off street cars, and not persons who might cross such a highway for other purposes. In this connection it is of some significance that in the first part of the subsection, which deals with the passing of standing street cars, the persons to be protected are "passengers", while in the proviso, which deals with the passing of safety zones, it is the "safety of pedestrians" that is mentioned. Further in this connection it is well to regard the terms of para. 48 of s. 407 of The Municipal Act, which authorizes a municipality to establish safety zones. It reads as follows:—

“For setting aside and designating in a suitable visible manner, on any highway upon which street cars are operated, any part or parts as a ‘safety zone’ and for prohibiting motor or other vehicles from driving over or upon any such safety zone while any pedestrian is thereon or about to enter thereon.”

There is nothing about standing street cars here. The municipality may prohibit driving over or upon a safety zone regardless of the presence or absence of a standing street car. Moreover the person who is to be protected when on or about to enter on a safety zone, is referred to not as a “passenger” but as a “pedestrian”. It is not unreasonable to think that the Legislature intended by the language it used in s. 42(1) of The Highway Traffic Act to extend the protection that municipal councils were already authorized to provide at safety zones for all pedestrians who made use of them.

It is obvious, moreover, that unless one is to be quite arbitrary about it, it is necessary to carry down from the first clause of the subsection into the proviso more words than the words relating to a stationary street car. As an instance, why not also carry down the words that give protection until the persons to be protected have got safely to the side of the street? One would think that it is as necessary to so provide at a place where there is a safety zone as at any other place where street cars stop. To insert all that is necessary to be consistent would make a very different clause from that enacted. It is difficult to conclude that the Legislature left so much unsaid, if the intention was as appellants contend.

Appellants’ counsel further supported his argument with the statement that, literally interpreted, the restrictions as to speed when passing safety zones are impracticable and that the Legislature could not have intended to impose such restrictions upon traffic as would result from slowing down to not more than a rate of 15 miles per hour at every safety zone. The Legislature, however, had already delegated the setting aside of safety zones to each individual municipality. The question of slowing up traffic will doubtless be taken into account by the municipal councils when occasion calls for it.

Other arguments were made for the supplying of words that the Legislature did not use. It was pointed out that this section is found in Part VII of The Highway Traffic Act, which is headed “Rules of the Road”, while Part V deals with “Rate of Speed”.

It is obvious, however, that the subsection in question does deal with the rate of speed at the places mentioned. The whole question is as to the occasions when speed is to be reduced. Whether this particular regulation as to speed should appear in Part V or in Part VII was wholly a matter of convenience.

Then it is argued that in any event the subject matter dealt with by s. 42 is the passing of street cars—subs. 1 dealing with passing standing street cars, and subs. 2 with passing street cars either stationary or in motion. It is argued that the proviso at the end of subs. 1 should be interpreted in the light of this, and should, therefore, be confined to the passing of safety zones at which a street car is standing. In that connection *Le Bar v. Barber and Clarke*, 52 O.L.R. 299, [1923] 3 D.L.R. 1147, is cited. In that case the general words of the statute were held to be restricted by the title of the Act and the subject matter of its provisions. The structure of the subsection here in question does not seem to permit of the application of that principle. The subsection begins with a provision expressly and definitely dealing with the case of a stationary street car. The proviso deals, however, with another subject matter, that is, with safety zones. The proviso begins by saying that the subsection, to which the proviso was added by later enactment, shall not apply where a safety zone has been set aside and designated by by-law passed under The Municipal Act. The particular words the interpretation of which is in question, are part of the proviso, and they also deal with the same subject matter, that is, with safety zones. I see no logical ground for importing words from the provisions relating to the passing of stationary street cars into the provision dealing with the passing of safety zones, when the latter provision begins by expressly excluding the application of the earlier provisions.

To anyone familiar with the provision of safety zones for the convenience of pedestrians crossing highways, even where no street cars are operated, it will seem not at all unreasonable but on the contrary highly convenient that some special provision should be made to assist pedestrians in crossing busy streets in safety, by restricting the rate of speed of vehicular traffic at such places.

Appellants' counsel presented an able and interesting argument, but I find it impossible to conclude that the Court would be justified in reading into the subsection the limiting words

contended for. There are no certain grounds for concluding that the Legislature failed to express its full meaning in the language of the statute. The Court has no right to restrict the plain meaning of the language that the Legislature has used, except where that is necessary to give effect to the intention of the Legislature. The interpretation of this statute according to the plain and ordinary meaning of its language is neither so in conflict with what may reasonably have been the intention of the Legislature, nor so inconsistent with or foreign to the other provisions of the Act as to afford ground for a judicial interpretation that might well amount to legislation.

It was very properly conceded by counsel for appellants that his appeal cannot succeed unless he has convinced the Court that his interpretation of subs. 1 of s. 42 is the proper interpretation. As it is not possible to accept the interpretation for which he has contended, no other aspect of the appeal need be discussed, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Daly, Hamilton & Thistle, Toronto.

Solicitor for the plaintiff, respondent: D. J. Walker, Toronto.

[COURT OF APPEAL.]

Wyant v. Welch.

Negligence—Breach of Duty Created by By-law—Whether Civil Liability Exists—Plaintiff Not Member of Particular Class—Intention of Legislature and Municipality — The Highway Improvement Act, R.S.O. 1914, c. 40, s. 21(2).

Animals—Horse Running at Large on Highway—Whether Owner Liable.

A municipal by-law, adopted under s. 21(2) of The Highway Improvement Act, R.S.O. 1914, c. 40 (later repealed), provided that it should be "unlawful for any person to suffer or permit any horses . . . of which he is the owner, or which are in his possession or custody or under his control, to run at large on any highway." Penalties were provided for any breach of the by-law. *Held*, this provision did not of itself give a cause of action to a person injured through the presence of a horse upon the highway. *Tompkins v. The Brockville Rink Company* (1899), 31 O.R. 124; *Orpen v. Roberts et al.*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101; *Taylor v. People's Loan and Savings Corporation*, 63 O.L.R. 202, [1929] 1 D.L.R. 160, applied; *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365, [1938] 3 D.L.R. 456; *Hall et al. v. The Toronto Guelph Express Company et al.*, [1929] S.C.R. 92, 63 O.L.R. 355 at 364, [1929] 1 D.L.R. 375, distinguished. It could not be said that it was within the contemplation of the Legislature or of the municipality to do more than regulate the running of animals on the highway, and the common law rights of individuals were affected no further than was necessary to give effect to the clearly expressed provisions of the by-law; there was no intention of giving a right of action to an individual by reason of a breach of the by-law alone. *Semble*, it could not be said that the by-law was for the benefit of a particular class, of which the plaintiff was a member, as distinguished from the general public. *Direct Transport Co. Ltd. v. Cornell*, *supra*, considered.

AN appeal by the plaintiff from the judgment of Hope J., after the trial of the action before him and a jury, dismissing both the action and the counterclaim. The facts are fully stated in the judgment of GILLANDERS J.A.

16th November 1942. The appeal was heard by ROBERTSON C.J.O. and HENDERSON and GILLANDERS JJ.A.

M. Lerner, for the plaintiff, appellant: The municipality is empowered to pass such a by-law by reason of The Municipal Act, R.S.O. 1937, c. 266, s. 405(49). The by-law itself refers to the Highway Improvement Act, the relevant section of that Act now being R.S.O. 1937, s. 74(3), as amended by 1939 (Ont.), c. 19, s. 5. [ROBERTSON C.J.O.: This is a county road, not the King's Highway.] [HENDERSON J.A.: Where is there anything there to authorize the County to pass the by-law?] [ROBERTSON C.J.O.: You are proceeding on the assumption that the by-law imposes a duty on the owner of the horse to keep it in an enclosure.] There was a direct prohibition under the by-law, and once there was a breach, the liability of the respondent is

absolute, regardless of the circumstances. The learned trial judge did not so direct the jury in his charge, nor did the jury fully understand the effect of *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365, [1938] 3 D.L.R. 456. [ROBERTSON C.J.O.: That case was tried before the amendment of s. 74(3) of The Highway Improvement Act, which was made to protect the owner of a horse if it escaped without the owner's knowledge. Where does a municipal by-law derive the power to impose civil liability or give a right of action for damages?] [HENDERSON J.A.: You are basing your case entirely on the proposition that the appellant here is in the same position as the plaintiff in *Direct Transport Co. Ltd. v. Cornell*, *supra*.] Yes, the amendment to The Highway Improvement Act in 1939 was subsequent to the judgment in the *Cornell* case, but it does not apply to a county by-law—the amendment specifically refers to the King's Highway. [HENDERSON J.A.: As I understand it, the jury found that the horse was on the road through no fault of the respondent.] [ROBERTSON C.J.O.: It is your contention that if the jury had been properly instructed, they would unquestionably have found that there had been a breach of the by-law?] The trial judge should have instructed the jury that if a horse was found on the road in contravention of the by-law, the answer to question 1 should have been in the affirmative. [GILLANDERS J.A.: You say the verdict of the jury is perverse?] [HENDERSON J.A.: The jury said that it was not the fault of the respondent that the horse was at large.] [ROBERTSON C.J.O.: It was a foggy night—was the motorist's view obscured?] The jury found no negligence on the part of the appellant in driving his car. [ROBERTSON C.J.O.: The crux of the question is whether civil liability follows a breach of the statute.]

No one appeared for the defendant, respondent.

Cur. adv. vult.

24th November 1942. ROBERTSON C.J.O. agrees with GILLANDERS J.A.

HENDERSON J.A.:—I have had the privilege of reading the opinion of my brother Gillanders, with which I agree.

The Municipal Act teems with multitudinous provisions enabling municipalities to pass by-laws and to provide penalties for the breach thereof. In my opinion it is not reasonable to

suppose that it is the intention of the legislation to enable municipalities to create rights of civil action in persons aggrieved by the breach of such by-laws. Such a doctrine would result in creating rights to maintain actions for civil damages which might vary in every municipality in the Province.

GILLANDERS J.A.:—The plaintiff appeals from a judgment dismissing his action for damages, which was tried before Mr. Justice Hope and a jury.

Between 6.30 and 7 o'clock on the evening of 19th October 1940, the plaintiff was driving a truck on a paved highway under the jurisdiction of the County of Middlesex. It was dusk or dark, and he had his lights on. It was a foggy evening and visibility was low. He was driving, he says, at about thirty miles per hour, and could not see more than forty to fifty feet ahead. While so driving, he suddenly saw a horse's head extending out into the roadway. To avoid this horse the plaintiff swerved sharply to his left and almost at once collided with an object which he had not seen. This object proved to be another horse, owned by the defendant. The horse which the plaintiff had seen, and turned out to avoid, did not belong to the defendant. As a result of the collision the plaintiff was injured and it was necessary to destroy the injured horse. The plaintiff sues for the damages he sustained, and the defendant counterclaims for the loss of the horse.

The first two questions put to the jury, and the answers thereto were:—

"1. Did the defendant fail to observe the duty imposed on him by By-law 1033? Answer: (Yes or no) 'No.'

"2. Was the defendant guilty of any negligence which caused or contributed to the accident? Answer: (Yes or no) 'No.' "

In answer to other questions the jury found that the plaintiff was not guilty of any negligence, and assessed the damages of both parties.

The defendant's horse had been placed in a pasture field with other horses, and how it got on the highway is not known. It is conceded that, apart from any absolute duty that might be imposed by the by-law to be later discussed, the defendant's horse did not get on the highway due to any lack of reasonable care on the part of the defendant. The appellant relies on a by-law passed by the Municipal Corporation of the County of

Middlesex. This by-law was passed in 1924, purporting to be under the authority of The Highway Improvement Act, R.S.O. 1914, c. 40, s. 21(2), and provides, *inter alia*:

"1. That it shall be and is unlawful for any person to suffer or permit any horses, cattle, sheep, swine or goats, or any geese, ducks or other fowl of which he is the owner, or which are in his possession or custody or under his control, to run at large on any highway under the control of the County of Middlesex." A penalty is provided in and by the by-law for breach thereof.

The appellant contends that the only proper and possible answer on the evidence to the first question is "Yes", and that on this answer judgment should be entered against the defendant for the amount of damages fixed by the jury. He relies on the principle applied in *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365, [1938] 3 D.L.R. 456, and *Hall et al. v. The Toronto Guelph Express Company et al.*, [1929] S.C.R. 92, 63 O.L.R. 355 at 364, [1929] 1 D.L.R. 375.

Even if one concedes that there was a breach of the by-law in question, I think the plaintiff's action cannot succeed. The principle which he seeks to apply to support his claim has been discussed in many cases. Before holding that it is applicable in support of the plaintiff's claim in the circumstances here present, it remains to consider two points:

(1) Is the plaintiff within a particular class intended to be benefited by the by-law in question? and

(2) Even if question 1 is answered in the affirmative, does the breach of this by-law in itself confer on the plaintiff a civil right against the defendant, enforceable by action?

In *Tompkins v. The Brockville Rink Company* (1899), 31 O.R. 124, Meredith C.J. carefully reviews many of the leading authorities then in existence. In that case a by-law had been passed by the council of a city, setting apart certain areas as fire limits, where no wooden buildings could be erected, and providing that buildings erected in contravention thereof might be pulled down and that a penalty might be imposed. The owner of an adjacent property brought action claiming that his property was injuriously affected by the defendant's contravention of the by-law. It was held that the by-law gave no such right of action. In the course of his judgment the Chief Justice points out that while the broad proposition stated in *Couch v.*

Steel (1854), 3 El. & Bl. 402, 118 E.R. 1193, is not maintainable, the principle is as stated and approved in the well known case of *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, where the opinion of Lord Cairns L.C. in *Atkinson v. The Newcastle and Gateshead Waterworks Company* (1877), 2 Ex. D. 441, is referred to with approval. In the course of his judgment the learned Chief Justice says in part, at p. 127:

“This case establishes that where, applying the test suggested by Lord Cairns and approved by Lord Herschell [in *Cowley v. The Newmarket Local Board*, [1892] A.C. 345], it appears that the statute ‘provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty’ (*per* Lord Justice Vaughan Williams, at pp. 415-16); and I take it to be a corollary of this that where the legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty in the general interest of the public at large *prima facie*, and if there be nothing to the contrary, an action by a person injured by failure to perform the duty imposed does not lie.” And further, after some discussion of the legislation there in question, he continues at p. 130:

“When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose in respect of persons and property within their jurisdiction, one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it.”

This case is referred to with approval in *Orpen v. Roberts et al.*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, where Duff J., as he then was, says, at p. 369 (S.C.R.):

“Where the offence consists in the non-performance of a duty imposed by statute or the non-observance of a prohibition created by statute, then the rule, based upon the Statute of Westminster, 13 Edw. V, c. 50, is, as stated in Comyn’s Digest (‘Action upon Statute’ (F)):

“‘In every case where a statute enacts or prohibits a thing for the *benefit of a person* he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law.’

“Obviously, this leaves it to be determined in each case whether the enactment relied upon was passed for the benefit of the person asserting the right to reparation or other relief; and, assuming that question to be answered in the affirmative, there may still be the general principle to be considered, that, to quote Lord Selborne in *Brain et al. v. Thomas et al.* (1881), 50 L.J.Q.B. 662.

“‘Where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined, and no other.’

“But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.”

After discussing the history of The Municipal Act, R.S.O. 1914, c. 192, under the authority of which the by-law there in question had been passed, Duff J. says, at p. 375:

“There are many actions which have been successfully maintained though founded, in the last analysis, upon what were merely by-laws provided for by statute and well founded thereon, but few, if any, upon our Municipal Acts.

“This is one of the many cases in which I have had to turn to the judgment of Lord Cairns in the case of *Atkinson v. Newcastle and Gateshead Waterworks Co.* [*supra*], where he indicated that the right to a remedy, claimed to be founded upon a statute, must to a great extent depend on the purview of the legislature.”

The question is succinctly and clearly dealt with by Middleton J.A. in *Taylor v. People's Loan and Savings Corporation*, 63 O.L.R. 202, [1929] 1 D.L.R. 160 (affirmed [1930] S.C.R. 190,

[1930] 2 D.L.R. 891), where that learned judge says at p. 208 (O.L.R.):

“But on a far wider principle I think the entire argument is misconceived. Where a supreme legislative authority by its enactment imposes a duty upon any individual to do something for the benefit and protection of a particular class, an action will lie at the instance of any member of the class for an injury which has resulted from the neglect of that duty. Where a particular penalty is by the statute provided to secure the observance of the statute and as a punishment for the breach of its requirements, this may or may not indicate an intention on the part of the Legislature that this liability for a penalty is to be the sole result of a breach of the requirements of the Act. In each case the task confronting the Court is to discover the intention of the Legislature. It is true that it has been held that regulations made under the authority of a statute may be treated as being part of the statute for the purpose of this inquiry: *Ross et al. v. Rugge-Price* (1876), 1 Ex. D. 269; but I know of no authority indicating that the same principle is applicable to municipal by-laws passed under the general authority of the Municipal Act, or under any specific provision of that Act.”

After carefully considering the provisions, there in question, of The Municipal Act, R.S.O. 1927, c. 233, he concludes: “All this is cogent evidence of the absence of any legislative intent to give a right of action to an individual aggrieved.”

An examination of The Highway Improvement Act, R.S.O. 1914, c. 40, leads to the same conclusion. Without entering into a discussion of its provisions, it is sufficient to say that neither this Act, nor The Municipal Act in force at the time the by-law was passed, was intended to give a right of action to an individual against another by reason of a breach of this by-law alone.

I do not think it can be said that it was within the contemplation of the Legislature by the provisions of the relevant statutes, or of the county corporation in enacting the by-law, to do more than regulate the permitting of animals to run at large on the highway. I cannot think that this by-law, and numerous other municipal by-laws, affect the common law rights of individuals to any greater degree than is necessary to give effect to their clearly expressed provisions, or that the Legislature intended here to make a breach of such a by-law statutory and

actionable negligence. Such an intention cannot be read from the legislation and does not expressly or impliedly appear as part of the enactment.

It should be noted that the cases relied on by the plaintiff both concerned provisions of a provincial statute. In *Hall et al. v. The Toronto Guelph Express Company et al.*, *supra*, it was held in effect that a section of The Highway Traffic Act providing for the maintenance of a tail light burning visibly on a motor vehicle, imposed an absolute liability apart from negligence, and that failure to have a light burning in accordance with the provisions of the Act might, if a cause of a collision resulting damages, involve civil liability, under the section of the Act imposing responsibility on the owner and driver of the motor vehicle for any violation of the Act, even where the light was burning until shortly before the accident and went out without the knowledge or personal fault or negligence of the driver. In *Direct Transport Co. Ltd. v. Cornell*, *supra*, this Court held that a section of The Highway Improvement Act, somewhat similar to, but not identical with, the relevant part of the by-law here in question, and referring to the King's Highway, imposed an absolute duty and that a breach, under certain conditions, of this absolute duty so imposed founded an action for damages.

It might be noted in connection with the decision in *Direct Transport Co. Ltd. v. Cornell*, that the section on which that decision turned, was amended in the following year by s. 5 of The Highway Improvement Amendment Act, 1939, c. 19, which added the following proviso: "provided that this subsection shall not create any civil liability on the part of the owner of horses, cattle, swine or sheep for damages caused to the property of others as a result of such horses, cattle, swine or sheep running at large within the limits of the King's Highway."

If the question is still open, I would hold further that the provisions of the by-law in question cannot be said to be for the benefit of a particular class, of which the plaintiff is one, as distinct from the public at large. The by-law, of course, may benefit persons travelling on the highway. But the public at large are entitled to use the highway, and this can hardly be said to be a particular class. From a consideration of the legislation it would appear that it may also be for the protection of the highway itself, and it might also operate for the protection of the property of adjoining owners.

I appreciate that in *Direct Transport Co. Ltd. v. Cornell, supra*, the provisions there under consideration were held to be for the protection "of a particular class of persons, namely, those who are travelling on the highway and suffer damage from breach of the statute" (per Masten J.A. at p. 367, O.R.). While the wording of the by-law here in question is somewhat similar, yet, keeping in mind the limited purposes and authority of the municipal corporation, I think it cannot be said here that the plaintiff is one of a particular class, as distinguished from the public at large, intended to be benefited by the by-law here in question.

It follows that the appeal must be dismissed without costs.

Appeal dismissed without costs.

Solicitors for the plaintiff, appellant: Lerner & Lerner, London.

Solicitor for the defendant, respondent: Thomas W. I. Gibson, London.

[HOPE J.]

Keats v. Keats and Allen.

Divorce—Bars to Relief—Misconduct of Plaintiff—Discretion of Court—Limits of Exercise of Discretion—Rule 778.

The discretion of the Court to relieve an offending spouse against the consequences of his own misconduct should not be exercised to the extent of granting dissolution of marriage to a wife who not only has committed adultery in the past, but has continued to live in adultery up to the time of the trial, and shows every intention of continuing to do so thereafter. *Newson v. Newson and Davidson*, [1936] O.R. 117, [1936] 1 D.L.R. 696, applied; *Andrews v. Andrews*, [1940] 3 All E.R. 87.

AN undefended action by a wife for divorce.

23rd November 1942. The action was tried by HOPE J. without a jury at Kingston.

H. L. Cartwright, for the plaintiff.

No one for the defendants.

30th November 1942. HOPE J.:—This is an undefended divorce action. The plaintiff was married to the defendant on the 1st day of January, 1931, and after four months she separated from her husband, and has continued to live apart from him

since then. No children were born of the marriage. The husband subsequently, in 1938 or earlier, commenced to live and cohabit with his co-defendant, and still continues to do so. A child has been born to the defendants. The evidence quite clearly establishes such adultery on the part of the defendant husband as would entitle the plaintiff to a judgment *nisi* for the dissolution of their marriage.

In her statement of claim the plaintiff admits matrimonial misconduct on her own part and, pursuant to Rule 778, she filed with her statement of claim a sealed statement of such misconduct for the information of the Court. This statement, however, does not comply with the requirements of Rule 778, in that it is signed, not by the plaintiff herself, but by her solicitor. However at the trial the plaintiff corroborated the misconduct set out in the statement so filed, in which she admitted that in the autumn of 1939 she commenced to live with a soldier who was in the Canadian army, and that she assumed the name of such soldier rather than her own proper name. She was apparently so living in adultery at the time of the issue of the writ, has continued so to live until the date of the trial and proposes to continue so doing. I take it that if she obtained judgment absolute for the dissolution of her marriage, she would then marry her paramour.

In the statement filed purportedly under Rule 778, it is stated that the plaintiff made an application for separation allowance to be allowed to her by the military authorities, as the "common law wife" of the said soldier. At the trial it appeared that such application has not yet been granted, but that decision thereon has been withheld pending this application for dissolution of her marriage.

With such a confession, the plaintiff now asks the exercise of the discretion of the Court in her favour, purging her of the disability which has been incurred by her own adultery, in which she continues. The proper exercise of discretion by the Court in any particular case must not be governed by sympathy for the individual concerned, but such discretion must be exercised judicially.

The cardinal difference between the jurisdiction of the Court in divorce matters and its jurisdiction in other litigation is that the institution of marriage is regarded by the law as requiring special protection in the public interest, and therefore a matri-

monial petition is not merely the private concern of the parties, and the Court is vested with a peculiar duty of protecting the sanctity of marriage in so far as it can, in the exercise of its responsibilities. In a common law case, judgment is given against an absent defendant automatically in some cases, and with a minimum of proof in other cases, but a matrimonial suit, even if undefended, must be strictly proved. As was said by Scrutton L.J. in *Hyman v. Hyman*; *Hughes v. Hughes*, [1929] P. 1, at p. 30:

“The stability of the marriage tie, and the terms on which it should be dissolved, involve far wider considerations than the will or consent of the parties to the marriage. The Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties”.

It is the duty of the Court to inquire into any circumstances suggesting an absolute or discretionary bar.

In *Newson v. Newson and Davidson*, [1936] O.R. 117, [1936] 1 D.L.R. 696, Middleton J.A. has in great detail reviewed the matter of the exercise of the Court's discretion where the petitioner has offended against the marriage vows. It would be idle and unnecessary for me to repeat such exhaustive review.

The more recent case of *Andrews v. Andrews*, [1940] P. 184, [1940] 3 All E.R. 87, does not depart, in my opinion, from the general principles so clearly enunciated in *Newson v. Newson and Davidson*.

Our present Rule 778 was first introduced in 1939, but this Rule did not in any way contemplate a broadening of the principles governing the exercise of judicial discretion. A careful reading of this Rule clearly indicates that it refers to some past adultery on the part of the plaintiff. It cannot be considered as having been intended to extend to a course of conduct deliberately persisted in by the plaintiff prior to the commencement of the action, and continuing throughout even to the trial and with every intention to be continued thereafter.

I must therefore conclude that this is not the type of case in which it is desirable in the public interest that the Court's discretion should be exercised in favour of the plaintiff. The action is therefore dismissed.

Action dismissed.

Solicitor for the plaintiff: H. A. McNeill, Kingston.

[GREENE J.]

Yachetti et al. v. John Duff & Sons Limited and Paolini.

Sale of Goods—Implied Warranty of Fitness—Sale of Infested Meat—The Sale of Goods Act, R.S.O. 1937, c. 180, s. 15.

Negligence—Liability of Manufacturer to Ultimate Consumer—Infested Meat—Possibility of Discovering Condition—Special Statutory Provisions.

The liability of a manufacturer to the ultimate consumer, laid down in such cases as *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562; *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85, [1936] 1 W.W.R. 145, and *Arendale et al. v. Canada Bread Company Ltd.*, [1941] O.W.N. 69, [1941] 2 D.L.R. 41, and in 23 Halsbury, 2nd ed., para. 887, p. 632, should not be extended to the case of a packer who sells fresh pork infested with the parasites known as *trichinae*. The packer is not a "manufacturer" in the ordinary sense; it does not manufacture the hogs, and can have nothing to do with the presence of the *trichinae*, since they must have been present in the hog before its death.

Whether or not an absolute liability in damages, irrespective of knowledge, is imposed by the statutory by-law provided for by s. 124 of The Public Health Act, R.S.O. 1937, c. 299, by s. 14 of The Meat and Canned Foods Act, R.S.C. 1927, c. 77, or by s. 40 of The Animal Contagious Diseases Act, R.S.C. 1927, c. 6, pork infested with *trichinae* does not come within the words of those statutes, since it is not "unhealthy" or "unfit for food", or within the corresponding provisions in the other sections. It is clearly established that pork so infested can be made completely harmless by being sufficiently cooked. *Quaere*, whether the sections referred to do impose such a liability. *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365, [1938] 3 D.L.R. 456, considered.

A pedlar who sells sausages made from pork so infested is not liable for a breach of the implied warranty of fitness under s. 15 of The Sale of Goods Act, R.S.O. 1937, c. 180, since such sausages are fit for use in the normal way, *viz.*, after being properly cooked.

AN action by a husband and wife, claiming damages of \$50,000. The facts are fully stated in the judgment.

2nd, 5th, 6th and 7th October 1942. The action was tried by GREENE J. without a jury at Hamilton.

1st December 1942. GREENE J.:—The defendant John Duff & Sons Limited is a meat packing company, and the defendant Perigio Paolini is a meat pedlar. The defendant company sold fresh pork to the defendant Paolini, who ground it up and sold part of it in the form of uncooked sausages to the plaintiffs.

It is alleged that the plaintiff Anna Yachetti was infected with trichinosis from eating the sausages, and thereby suffered permanent injury to her health. Her husband and co-plaintiff claims for out-of-pocket expenditure and loss of *consortium*.

The action as framed against the defendant Paolini is for a breach of the implied conditions imposed upon a vendor by s. 15 of The Sale of Goods Act, R.S.O. 1937, c. 180, that the goods

shall be reasonably fit for the purpose for which they are sold, and that they shall be of merchantable quality.

As against the defendant John Duff & Sons Limited the action is framed in tort for negligence in producing and selling meat infested with *trichinae*, and as such alleged to be unfit for human consumption. The plaintiffs also allege the contravention of the penal provisions of certain statutes, which will be dealt with in greater detail later on, and are The Public Health Act, R.S.O. 1937, c. 299, The Meat and Canned Foods Act, R.S.C. 1927, c. 77, and The Animal Contagious Diseases Act, R.S.C. 1927, c. 6. The position of the plaintiffs is that such penal provisions impose an absolute duty apart from knowledge, and that upon a breach being established a finding of negligence must follow.

The pork sold by the Duff company to Paolini, and by him manufactured into sausages, contained the parasites known as *trichinae*. Paolini sold one pound of such sausages to Anna Yachetti and she testified that she had not purchased or eaten any other fresh pork at any relevant time. She commenced to cook the sausages one Saturday at noon, expecting her husband home shortly. After half an hour she put a lid over the sausages in the frying pan and allowed them to simmer for another hour and a half, when her husband returned. She and two of her children became afflicted with trichinosis, but her husband, Americo Yachetti, did not suffer any ill effects, although he ate more of the sausages than any of the others. On cross-examination Mrs. Yachetti admitted that she may have eaten some of the sausages during the first half hour, although she did not distinctly remember so doing. It is a well-established fact that cooking fresh pork to 131 degrees Fahrenheit will kill the *trichinae*. As the husband suffered no ill effects from eating the sausages after they had been well cooked, while Mrs. Yachetti and the two children did, the reasonable conclusion on the whole evidence is that she became afflicted with trichinosis through eating part of these particular sausages before they had been properly cooked.

It was argued on behalf of the defence that she might have been mistaken when she said that she had not eaten any other fresh pork at any relevant time, but she is not likely to be mistaken about that. Her evidence in that regard was positive,

while she was not prepared to deny that she might have eaten some of the sausages while they were being cooked. The medical evidence and the dates upon which she and the children became ill support a conclusion that she contracted trichinosis from eating these particular sausages before the *trichinae* had been killed by the moderate amount of heat required.

All the meat produced and sold through the Duff plant was inspected by two veterinary surgeons, appointed by the Minister of Agriculture of the Dominion, under the provisions of The Meat and Canned Foods Act. The fresh pork in question in this action was inspected by such inspectors and stamped "Canada Approved" in accordance with the provisions of the Act. No test was made for *trichinae*, and the evidence established that such a test is not commercially feasible. The parasites which have been ingested by a hog in a short time cease any active life in the worm stage and become encysted in microscopic size in the muscles of the hog, where they remain inactive until taken into the stomach of another host, hog or man. The only two methods of locating the parasite in its encysted form are by artificial digestion of a piece of the hog muscle, or by microscopic examination thereof. That these methods are not commercially feasible is generally acknowledged and is shown by the fact that three-quarters of the hog might be destroyed by testing in either of the above ways, with negative results, whereas the remaining one-quarter of the hog might be infested with the parasite. Microscopic examination was called for at one time by the United States Government, but was abandoned over thirty-five years ago as being ineffective for protection of the consumer and also as giving a false sense of security.

Inspection by the veterinary surgeons appointed by the Dominion Government is really not relevant, as they made no test for *trichinae*. Their presence in the plant, however, did establish that the requirements of The Meat and Canned Foods Act were being complied with in the matter of government inspection. In the light of the inspection by the Dominion Government inspectors, and the nonfeasibility of testing for the parasite, it is hard to conceive what other precaution the Duff company could have taken in regard to the sale of fresh pork. It was suggested in argument that the Duff company should warn the purchaser that it is unsafe to eat fresh pork without cooking. In view of the fact that fresh pork has been sold

from time immemorial without such warning and that there is no government regulation requiring it, there does not seem to be proper ground for a finding that lack of warning is negligence. The packer has no knowledge that the pork has *trichinae*, and indeed in this case the packer had no opportunity of giving any warning to the present plaintiff Anna Yachetti. Even if she had purchased direct from the packer and warning was called for, it was not necessary in her case as she knew that it was important that fresh pork sausages should be well cooked.

The plaintiffs also impute negligence against the Duff company on the basis of breach of a manufacturer's duty to an ultimate consumer as dealt with in *McAlister (or Donoghue) v. Stevenson*, [1932] A.C. 562; *Grant v. Australian Knitting Mills, Limited et al.*, [1936] A.C. 85, [1936] 1 W.W.R. 145 (P.C.), and *Arendale et al. v. Canada Bread Company Ltd.*, [1941] O.W.N. 69, [1941] 2 D.L.R. 41. That duty, as dealt with in the above and like cases, is set forth in Halsbury's Laws of England, 2nd ed., vol. 23, para. 887, at p. 632, as follows:

"Apart from any warranty and from the duty of a vendor or supplier of dangerous goods to warn the recipient, a manufacturer of an article taken internally, or applied externally, or of any other chattel, which is sold by him in such a form as to show that he intends the article or chattel to reach the ultimate consumer in the form in which it left him with no reasonable possibility of intermediate examination, owes a duty to such consumer to take reasonable care in the manufacture, preparation, or putting up of the article or chattel so that it will not result in an injury to the customer's life or property. In order to establish liability on the part of a manufacturer of an article or chattel sold in the form described above it must be proved that the defect was hidden and unknown to the consumer, that proximate relationship existed between the manufacturer and the user of the article or chattel, and that the injury was caused by the negligence of the manufacturer."

It will be remembered that the *Donoghue* case dealt with a snail in ginger beer in an opaque bottle, the *Australian Knitting Mills* case with a deleterious chemical present in woollen underwear, and the *Canada Bread* case with glass in a loaf of bread. In all these cases negligence was found against the manufacturer on the principle of *res ipsa loquitur*. The circumstances in each

case were such that negligence in the manufacture was inferred. In the case at bar the circumstances, in my opinion, do not warrant such an inference. There was no "manufacturing" in the ordinary sense. The defendant meat packing company did not manufacture the hog or hogs, so that it could have had nothing to do with the presence of the *trichinae* in the fresh pork. The *trichinae* must have been in the hog when it reached the packing house. The only question left is that of inspection of the quality of the raw material prepared for sale. In the light of the facts already discussed, no inference of negligence should be made in that connection.

The question remains for consideration as to whether an absolute liability is imposed upon the meat producer by the statutes shortly referred to above, altogether apart from any question of knowledge as to the presence of the parasite on the part of the producer. S. 124 of The Public Health Act provides for a statutory by-law which is deemed by the Act to be in force in every municipality in the Province of Ontario. The pertinent portion of the by-law is (s. 11):—

"No person shall offer for sale within this municipality, as food, any diseased animal, or any meat, fish, fruit, vegetables, milk, or other article of food which, by reason of disease, adulteration, impurity, or other cause is unfit for use."

S. 14 of The Meat and Canned Foods Act provides a penalty for "slaughtering, or permitting the slaughtering of animals and selling . . . for food purposes, for export, a carcass, or any portion or product thereof, which is unhealthy or unfit for food" Export is defined by the Act as meaning export out of Canada, or out of any Province to any other Province. As this pork was sold for consumption in Ontario and was consumed in Ontario, this Act probably has no application, but I prefer to discuss it on the basis of the words "unhealthy or unfit for food".

S. 40 of The Animal Contagious Diseases Act provides a penalty for selling any part of an animal, "infected with or labouring under any infectious or contagious disease at the time of its death".

In the application of the above statutes the plaintiffs rely upon *Direct Transport Co. Ltd. v. Cornell*, [1938] O.R. 365, [1938] 3 D.L.R. 456, which dealt with damages arising from the presence of cattle on a highway. An Ontario statute provides

a penalty for any owner of cattle who "suffers or permits the same or any of them to run at large within the limits of the King's Highway". It was held that failure of an owner to keep his cattle off the highway founded an action in damages for negligence because of the breach of an absolute duty irrespective of knowledge on the part of the owner.

It is frequently a difficult matter to decide whether the violation of a penal statute founds an action for negligence. Assuming for the moment that the sale of fresh pork infested with *trichinae* is a violation of the above statutes, I would hesitate to find that these statutes impose a liability for breach apart from knowledge on the part of the vendor. It would be very harsh legislation if so applied to the circumstances under consideration when it is impossible as a matter of practical procedure for the vendor to find out whether the pork in question is infested with *trichinae* or not. The result would be to prohibit the sale of fresh pork, and in view of the vast proportions of such sale that can hardly be taken to have been in the contemplation of the legislative bodies which passed the statutes. *Trichinae* in fresh pork can be destroyed by heating to 131 degrees Fahrenheit, or by freezing for twenty days at a temperature of five degrees above zero, but after either process has been carried out the product is not fresh pork.

Even if the statutes do impose an absolute liability there remains for consideration the question whether a hog infested with *trichinae* comes within the various words used in the above statutes in referring to meat which should not be sold for human consumption. The words would fall into two distinct pockets. The words for consideration are in the one pocket "diseased animal", "unhealthy", and "labouring under an infectious or contagious disease", and in the other pocket "food unfit for use" and "unfit for food".

The expert witnesses called by the defence were of the highest standing, including the Professor of Parasitology at McGill University, who holds a similar position at Macdonald College, one of the great agricultural colleges of Canada. This witness has made trichinosis the subject of much research work and study. Two other witnesses were the Director General of Veterinary Services for the Dominion of Canada and his associate in charge of the Health of Animals Branch of the Department of Agriculture of the Dominion Government. These last two wit-

nesses are the highest officials in the employ of the Dominion Government directly concerned with the work of the Government in the protection of the public from animal food unfit for use. Their evidence may be stated shortly as being to the effect that a hog with *trichinae* in it in the encysted form is not an unhealthy or diseased animal, nor is it unfit for food after being properly cooked. All of the scientific witnesses who were questioned on the point said they would have no hesitation in eating fresh pork so infested after it had been properly cooked.

Dressler et al. v. Merkel, Inc. et al. (1936), 24 N.Y. Supp. 697, is a decision by the highest appellate court of the State of New York in circumstances identical with the present case. Liability was alleged under statutes containing words similar to those of the statutes in force in the Province of Ontario. This, of course, is not a binding authority in our courts, but the wording of the judgment, at p. 702, sets forth in appropriate language the findings which, in my opinion, should be made on the evidence in the present case:

"This pork was not a 'portion of an animal unfit for food,' if the usual process of cooking was followed. So the part applicable must be 'if it is the product of a deceased animal.' This pork was not a product of a diseased animal in the ordinary sense of the term. In many cases the bodies of living human beings as well as animals contain parasites of one kind or another, yet the person or the animal may be perfectly healthy by the ordinary standards. 'The disease or the infirmity must be so considerable or significant that it would be characterized as disease or infirmity in the common speech of men.' *Silverstein v. Metropolitan Life Insurance Company* (1930), 254 N.Y. 81, 84, 171 N.E. 914, 915. Disease is commonly known as some ailment that disturbs and deranges some of the vital functions of an organ, causing a morbid physical condition, or that affects the ordinary health of a person; and 'in its natural and probable development it may be expected to be a source of mischief.' *Silverstein case, supra.* As to the animal, the disease had probably run its course, and the parasites had become innocuous, encysted in the muscles, until awakened into new activity and life in another field. The animal itself was not diseased, in the common definition of the term. It lived and was active, with nothing indicating that it was anything but normal. Neither man nor animal is considered 'diseased' because, at one period,

there was an acute ailment from which recovery was to all appearances complete, though the body may still contain parasites or bacilli, harmless to the host, but possibly dangerous to others if again they become loose.”

Before concluding a consideration of the above statutes it should be pointed out that s. 10 of The Meat and Canned Foods Act, is as follows:

“Every carcass, or portion thereof, found to be healthy and fit for food, shall be marked by an inspector in such manner as is provided by the regulations.

“2. The carcass, or portion thereof, may then be dealt with as the owner thereof sees fit, subject to the further supervision of the inspector.”

The pork was marked “Approved” by the Government inspectors under the Act and consequently was found by them to be “healthy and fit for food”. These words in s. 10 must be read in the same sense as “unhealthy or unfit for food” in s. 14. The pork having been marked by the inspectors it must be considered as being “healthy and fit for food”, according to the provisions of this Act.

In the light of the foregoing, it must also be held that there was no breach by Paolini of the implied warranty that the sausage meat was reasonably fit for the purpose for which it was sold, and was of merchantable quality.

The normal use of fresh pork is to eat it after cooking. If the plaintiffs had notified the defendant Paolini that they intended to use the fresh pork in an abnormal way, namely, raw or only partially cooked, and did so relying upon his knowledge, then liability might have ensued. *Griffiths v. Peter Conway Ltd.*, [1939] 1 All E.R. 685, was a case of abnormal use in which the plaintiff was held disentitled to recover because she had not notified the defendants of an intended abnormal use of the goods purchased. She purchased from the defendants a suit of Harris tweed, a rough material, which caused to the plaintiff some unusual irritation of the skin, because her skin was abnormally sensitive. The normal use of the suit was by a person with a skin of normal sensitiveness.

The plaintiffs here did not notify the defendant Paolini that they desired to make an abnormal use of the fresh pork sausages purchased from him, and consequently they cannot invoke the provisions of The Sale of Goods Act.

The plaintiffs' action as against both defendants is dismissed with costs. There will be no order as to costs of the third party proceedings.

I assess the damages of Americo Yachetti at \$1,500, and of Anna Yachetti at \$7,500.

Action dismissed with costs.

Solicitor for the plaintiffs: D. Justin Dore, Hamilton.

Solicitors for the defendant Paolini: Walsh & Evans, Hamilton.

Solicitors for the defendant company: Byrne & Dixon, Hamilton.

[ROSE C.J.H.C.]

[COURT OF APPEAL.]

Kelly v. O'Brien.

Constitutional Law—Parliament—Members—Penalties—Senator Concerned in Contract under which Public Money of Canada to be Paid—Limitation Section—Construction—The Senate and House of Commons Act, R.S.C. 1927, c. 147, ss. 21, 23.

Statutes—Construction—Penal Statute—Ambiguity—The Interpretation Act, R.S.C. 1927, c. 1, s. 16.

Liability to a penalty is not established by showing that upon one of two equally reasonable readings of a statute that penalty has been incurred. The defendant is entitled to judgment if the Act is ambiguous and if one reasonable reading will allow him to escape.

Semble, what s. 21 of The Senate and House of Commons Act, R.S.C. 1927, c. 147, prohibits is the doing of certain acts while a senator, and the penalty or forfeiture is one for every day during which the person who offends is a senator and continues to be a party to, or directly or indirectly concerned in, a contract under which the public money of Canada is to be paid, and by the effect of s. 23, the penalty is incurred only if it is sued for within a year; the bringing of an action within the year is a condition precedent to the forfeiture itself. If, therefore, the defendant has ceased to be a member of the Senate more than a year before the institution of the action, there is no liability to a penalty, and the action must be dismissed.

AN action for the penalty prescribed by s. 21 of The Senate and House of Commons Act, R.S.C. 1927, c. 147, which reads in part as follows:

“21. No person, who is a member of the Senate, shall directly or indirectly, knowingly and wilfully be a party to or be concerned in any contract under which the public money of Canada is to be paid.

“2. If any person, who is a member of the Senate, knowingly and wilfully becomes a party to or concerned in any such contract, he shall forfeit the sum of two hundred dollars for each and every day during which he continues to be such party or so concerned.

“3. Such sum may be recovered from him by any person who sues for the same, in any court of competent jurisdiction in Canada.”

S. 23 of the Act, relied on by the defendant, is as follows:

“23. No person shall be liable to any forfeiture or penalty imposed by this Act, unless proceedings are taken for the recovery thereof within twelve months after such forfeiture or penalty has been incurred.”

4th February 1935. The action was tried by ROSE C.J.H.C. without jury at Toronto.

J. R. Cartwright, K.C., and *G. D. Watson*, for the plaintiff.
W. N. Tilley, K.C., and *C. F. H. Carson*, for the defendant.

4th February 1935. ROSE C.J.H.C. (orally, at the conclusion of the trial):—The action is brought to recover a penalty of two hundred dollars a day for the three hundred and sixty-five days preceding the 5th day of October 1933, on which day the writ was issued. The defendant was not during that period and had not for some time previously been a member of the Senate; but the case against him is that while he was a member of the Senate he knowingly and wilfully became concerned in a contract under which public money of Canada was to be paid, and that he forfeited the sum of two hundred dollars for each day during which he continued to be concerned in that contract, even though on the days in respect of which the action is brought he was not a member of the Senate.

I agree with Mr. Tilley that the evidence that the defendant knowingly and wilfully was concerned in the contract while he was a member of the Senate is weak. The defendant ceased to be a member of the Senate either on the first of August or the first of September 1925, and if he is to be held liable it must be established that before that time in 1925 he knowingly and wilfully became concerned in the contract. . . . [The judgment here reviews the evidence on this point, and proceeds:] As I have said, any finding based merely upon that inference is a finding based, as I think, upon rather weak evidence.

However, I do not think that it is necessary to decide that the finding cannot be made, because in the view that I take of the meaning of the section it is really immaterial, for the purpose of the present case, whether the finding is made or not. I think that if I were compelled to decide positively whether the finding ought or ought not to be made I should take further time for consideration. I content myself now with saying that I think that the finding, if made, would be made upon evidence which is, if sufficient, barely sufficient for the purpose.

Now, without elaborating it, without discussing at length the several possible constructions that have been put forward, I shall state what in my opinion is the true meaning, as applied to this particular case, of ss. 21 and 23 of the statute. The sec-

tions I think must be read together, and when one is dealing with s. 21 I think that subss. 1 and 2 must be read together, and my view of the meaning of the two sections as read together is (and I think this is the view suggested by Mr. Tilley, although I may not be doing complete justice to his manner of putting it) that what is prohibited is being a senator and at the same time being directly or indirectly, knowingly and wilfully a party to or concerned in a contract under which the public money of Canada is to be paid, and that the penalty or the forfeiture is a forfeiture of two hundred dollars for every day during which the person who offends is a senator and is directly or indirectly, knowingly and wilfully concerned in such a contract; provided always that an action for the penalty is brought within twelve months after the incurring of the penalty. That proviso I have not stated perhaps very happily. My view is that the person who does the thing prohibited by s. 21(1) incurs, on each day during which he is a senator and concerned in the contract, a penalty if he is sued for it within the year. The suing for it within the year or the commencement of an action within the year is, under s. 23, a condition precedent to the forfeiture itself. S. 23, as Mr. Tilley has pointed out, does not limit the time in which a person entitled to money may sue for the recovery of that money. What the section says is that no person shall be liable to any forfeiture or penalty unless proceedings for the recovery of the forfeiture or penalty are taken within twelve months after it has been incurred. So I say, summarizing the sections and stating their combined effect, that what the Act makes law is that being a senator and being knowingly and wilfully concerned in a contract of a certain sort is prohibited and brings about a forfeiture if the forfeiture is sued for within a year. I do not think that any forfeiture was incurred during the year in respect of which this action was brought, and therefore I think that this action fails.

I have said that several views as to the meaning of the sections have been put forward, but that the opinion that I have been endeavouring to state is the opinion that appeals to me as most reasonable, having regard to all the clauses of s. 21 and to s. 23. But it is possible that the reading contended for by Mr. Cartwright is just as reasonable as the reading that I have chosen. One cannot be dogmatic in dealing with a section about which so much can be said. But even if the reading sug-

gested by Mr. Cartwright is equally reasonable with the reading that I have mentioned, this action would have to fail, because whatever may be said about s. 16 of The Interpretation Act, R.S.C. 1927, c. 1, to which Mr. Cartwright has referred, you do not establish a right to a penalty by establishing that upon one of two equally reasonable readings of the statute the penalty has been incurred. The defendant is entitled to judgment if the Act is ambiguous and if one reasonable reading will let him out. And while, as I have said, I think that it may be that Mr. Cartwright's reading of the statute is not an unreasonable one, I do think that the reading that I have adopted is at least equally reasonable. Indeed, I go farther than that; I think, and I say it with some diffidence, that it is the only reading that does complete justice to the whole of the legislation comprised in the two sections. On Mr. Cartwright's reading the offending member of the Senate can arrest the piling up of the penalty by ceasing to be concerned in the contract, but not by ceasing to be a member of the Senate; and that seems to me to create an anomaly which is not created by the reading that I have adopted. For those reasons the action will be dismissed with costs.

7th May 1935. The plaintiff appealed, and the appeal was heard by RIDDELL, MIDDLETON and FISHER JJ.A.

The same counsel appeared.

At the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, THE COURT delivered judgment orally, dismissing the appeal with costs, and expressing its agreement with the views of the trial judge.

Appeal dismissed with costs.

Solicitors for the plaintiff: Smith, Rae Greer & Cartwright, Toronto.

Solicitors for the defendant: Tilley, Thomson & Parmenter, Toronto.

[ROSE C.J.H.C.]

[COURT OF APPEAL.]

Re Leonard Estate.

Trusts—Construction—Referential Trust—Duplication of Charges—Contrary Intention—“Similar” Trusts.

The general principle in the construction of trusts created by reference is against a duplication of charges, or of “trusts in the nature of charges”. *Hindle v. Taylor* (1855), 5 DeG. M. & G. 577, 43 E.R. 994; *Boyd v. Boyd* (1863), 9 L.T. 166; *Trew v. Perpetual Trustee Company, et al.*, [1895] A.C. 264, applied. So where a testator provided that the “B2” share of his residuary estate should be divided and distributed, as to the first \$340,000 thereof, in seventeen equal shares, and that the excess over that amount should be held upon certain trusts, and further provided, as to the “B1” part, that it should be used for a period of years for designated purposes, and that upon the fulfilment of those purposes, the balance of the fund should “be held by my Trustees upon similar trusts, terms and conditions and for similar objects and purposes as the B2 part of my residuary estate”, *held*, this unexpended portion of the B1 part was not subject to distribution to the legatees of the seventeen shares first provided for, but was to be held subject to the same trusts as those designated for that portion of the B2 part which exceeded \$340,000.

One of the trusts of the will directed that a fund should be held and kept invested by the trustees for a period of five years, and should then be distributed by the trustees among five educational institutions to be designated by the committee of a foundation set up by the testator in his lifetime. The provisions of the will were such that moneys might fall into this fund from time to time after the expiration of the five-year period. *Held*, the committee must designate, once and for all, the institutions to benefit under this trust, and the institutions so designated would take, in the proportions designated by the committee, not only the moneys presently distributable, but other moneys as they fell to be distributed. The trust could not be so interpreted as to permit successive, and possibly different, designations of beneficiaries.

A MOTION by the executor and trustee of the will and codicils of R. W. Leonard, deceased, for the opinion, advice and direction of the Court with respect to certain questions in the construction of the will. The facts, and the questions propounded, are fully set out in the judgment.

21st October 1935. The motion was heard by ROSE C.J.H.C. in Weekly Court at Toronto.

W. S. Montgomery, K.C., for the trustees.

Hon. N. W. Rowell, K.C., and *H. Cassels, K.C.*, for the General Committee of the Leonard Foundation.

J. S. Denison, K.C., for Wycliffe College, a beneficiary.

J. G. Schiller, K.C., for the executors of the will of Kate Leonard, widow of the testator.

R. B. Gibson, K.C., for the Canadian Military Institute.

M. A. Seymour, K.C., for St. Thomas Church, St. Catharines, and for the St. Catharines General (and Marine) Hospital.

E. Godwin, K.C., for the Public Trustee.

31st December 1935. ROSE C.J.H.C.:—The testator in his lifetime set up, and vested in trustees, a fund, known as the Leonard Foundation, for providing scholarships for the education, in institutions to be selected by the trustees, but of certain types specified by the settlor, of students to be chosen by the trustees and possessing certain prescribed qualifications. The institutions in which the selected students are to be educated are not beneficiaries; the trust is simply a trust for the benefit of the students.

By his will as varied by several codicils the testator, after directing his executors to pay his debts and the duties chargeable in respect of any gift made by the will, gave his whole estate to the trustees of the will upon trusts which for convenience will in this judgment be numbered. They are the following:—(1) To transfer to the testator's wife, should she survive him, all chattels in and about his dwelling house. (2) To permit his wife to occupy the house during her lifetime (all expenditures for taxes, rates, insurance, and repairs being charged upon his residuary estate). (3) Upon the widow's death to convey the house to the testator's nephew Arthur Leonard Bishop if living (as he was). (4) Subject to the foregoing, to convert the residue of the estate into money and to invest the proceeds (with power to retain certain investments made by the testator). (5) As a first charge upon the estate (after the payment of the taxes, etc., in respect of the dwelling house) to set aside a fund sufficient to produce a stated annual income for his widow. (6) After the death of the widow to pay the last mentioned fund to the trustees of the Leonard Foundation to form part of the funds of the Foundation. (7) Subject as aforesaid to divide the residuary estate into two equal shares designated shares A. and B. (8) To divide share A. into two equal parts and to give one of such parts to the testator's nephew Arthur Leonard Bishop if living and to hold the other of such parts for Arthur Leonard Bishop and his issue. The terms of this trust are not here material, except that it is to be noted that if the trust for the nephew or his issue fails wholly or partially the part or the portion of it remaining in the possession

of the trustees is to be held upon the same trusts, terms, and conditions "as the said share B. . . . is hereinafter directed to be held and administered." . . . (9) To divide share B. of the residuary estate into three equal parts designated B1, B2 and B3. (10) "As to the B1 part . . . and as a first charge thereon", to pay certain annuities; "as a second charge", to pay certain gratuities to employees; and "as to the balance, if any, of the said B1 part", out of the income to pay for each of a number of beneficiaries the sum of \$1,000 a year in and towards the education of the beneficiary in one or more of the educational institutions designated in the Foundation trust; the education to commence as the beneficiary attains the age of 14 years and to continue until he or she attains the age of 18 years. Counsel were understood to say that the last of these payments for educational purposes would not be made before the year 1948. (11) Here are used the words which have given rise to the more difficult of the questions discussed upon this motion. They are as follows:—"From and after the completion of the education of each of said beneficiaries, then the capital of the balance of the said B1 part of my residuary estate and any unused income thereof not required for the education of remaining beneficiaries, shall be held by my Trustees upon similar trusts, terms and conditions and for similar objects and purposes as the B2 part of my residuary estate is in my said Will directed to be held." (12) "With respect to the B2 part" of the "residuary estate to divide same into shares in the following manner and proportions and on the following respective basis, namely:—"Assuming that the said B2 part shall amount to . . . 340,000 or under that amount, then the said part shall be divided into seventeen shares of equal amount, and such shares shall be held and disposed of in the following manner, namely:—"To pay" three of such shares to Wycliffe College to be used as the Governors shall see fit, the testator suggesting a certain use; to pay five of such shares to Wycliffe College for certain specified purposes; to pay two of such shares to the Church of England Deaconess and Missionary Training House, Toronto; to pay one of such shares to his widow to expend in her discretion in the completion of any unfinished or intended charitable or religious benefactions in which she or he might be interested; to pay one of such shares to St. Thomas Anglican Church, St. Catharines, for the construction

of a parish hall, or if the parish hall should have been constructed prior to his death (as it was—at his expense or with his assistance, as counsel was understood to say) then for the maintenance and endowment of the parish hall; to pay one of such shares to the same church for the maintenance and endowment of a named mission; to pay one of such shares to the St. Catharines General and Marine Hospital to be used for a certain stated purpose; to pay one of such shares to the Dominion of Canada Executive of the Boy Scouts in Canada; to pay one of such shares to the Dominion of Canada Executive of the Girl Guides in Canada; to pay one of such shares to the Canadian Military Institute, Toronto. (13) “Assuming however that the said B2 part shall exceed in amount the said sum of . . . \$340,000 then the said part shall to the extent of three hundred and forty thousand dollars be held and distributed by my Trustees in the manner and in the respective proportions and upon the respective terms and conditions as above provided . . . ; and the amount of the said Part B2 . . . in excess of the said three hundred and forty thousand dollars shall for the period of five years from the date of my death be kept invested by my Trustees and the net annual income derived from such investments shall during said period be added to the principal and kept invested therewith. On the expiration of the said period of five years the said balance of the said B2 part and all accumulations of interest thereon shall be distributed by my trustees among such five of the Educational Institutions designated in the . . . Foundation Trust . . . which may at the expiration of said period of five years be selected by the Committee designated in the said Indenture of Trust, and in the respective amounts directed by the said Committee. The selection of the five Educational Institutions to be benefitted hereunder and the fixing of the respective amounts of such benefits (which may not necessarily be of equal amounts) shall be left solely to the discretion of the said Committee . . . and my Trustees herein shall carry out the instructions of the said Committee in making the said distribution and be thereupon relieved from all further responsibility and liability in connection therewith.” (There follow in the will and in one of the codicils some declarations which need not here be set out, but one of which will be stated later, as to the institutions from among which the five are to be selected by the Committee). (14) “With respect

to the B3 part of my residuary estate I direct that my Trustees shall divide the same into six equal shares and to hold and distribute the said respective shares in the following manner, namely:—" to hold one in trust for the University of Toronto and another for Queen's University for certain specified purposes; to hold another in trust for the Royal Ontario Museum and another in trust for the Art Gallery of Toronto for specified purposes; to hold another in trust for the establishment and maintenance of homes and hostels; to hold the remaining share upon certain trusts for the testator's nephew and his children.

The testator died on December 17, 1930. The value of the B2 part of his estate largely exceeded \$340,000. There is therefore under the trust that in this judgment has been called number 13 a large sum for present distribution among the five educational institutions to be selected by the Committee of the Leonard Foundation; and hereafter from time to time as original assets are realized and the portion thereof attributable to the B2 part of the estate is allocated, there will be further distributions. The trustees of the will therefore, on this originating motion, ask for the opinion of the Court (1) as to the meaning and effect of the direction (in what I have called trust number 11) that "from and after the completion of the education of each of" the beneficiaries for whose education provision is made in trust number 10 "the balance of . . . B1 part . . . not required for the education of remaining beneficiaries shall be held by (the) Trustees upon similar trusts, terms and conditions and for similar objects and purposes as the B2 part . . . is . . . directed to be held"; and (2) as to whether the Committee of the Leonard Foundation must make one selection of institutions to share in whatever moneys shall fall to be distributed pursuant to trust number 13, or whether the Committee may make selections from time to time when distributions fall to be made.

As to the second of these questions, which is put first in the originating notice, I agree with Mr. Rowell who appears for the Committee that the selection is to be made once and for all. The Foundation trust, as has been mentioned, is not a trust for the benefit of educational institutions but a trust for the benefit of students. But the settlor stated very clearly in the trust instrument the purpose that he had in mind and the kind of institution in which he desired the students to pursue their studies; and when in his will he gave to five institu-

tions to be selected by the Committee of the Foundation all that should remain of the B2 part of his estate after the \$340,000 had been paid to the named beneficiaries, he said (the words have not yet been noted): "The Educational Institutions to be selected and to be benefitted hereunder shall be such as in the opinion of the Committee have shown *during the said period of five years*" (i.e., the period of five years immediately following his death) "the most marked success in connection with my objects and aims in the establishment of the said Foundation as outlined in the said Foundation Trusts, and which in the future may in the Committee's opinion be reasonably expected to show further marked success in connection with the said objects and aims." During the five years the Committee, expending money for the education of selected students, would have the opportunity of observing the work of educational institutions of the types designated by the testator, would form an opinion as to which of them had shown the most marked success in connection with his objects and aims, and an opinion also as to which were likely to show further marked success. The Committee, therefore, would be able to make a wise selection of five institutions to be the residuary legatees; and I think that the testator's intention was that the selection should be made at the end of the five-year period, even if at that time some part, whether large or small, of the residue should not be ready for distribution. And I think that the institutions selected will take, "in the respective amounts" (which I understand to mean in the proportions) "directed by the said Committee", not only the residue of what originally was part B2 of the estate but also whatever (under trust number 11) may fall to be distributed among institutions after the completion of the education of the designated beneficiaries. I think that to select more than five residuary legatees, some to divide amongst them the first portion of the residue to become distributable, others to divide amongst them portions later becoming distributable, and others to divide amongst them so much of the B1 money as becomes distributable upon the completion of the education of the students benefitted under trust number 10, would be to do something contrary to the testator's instructions expressed in the relevant parts of the will read together.

The second question asked—the question as to the meaning and effect of the direction that when money forming part of

the B1 part of the estate is no longer needed for the education of the beneficiaries designated in trust number 10 it shall be held upon similar trusts, terms and conditions and for similar objects and purposes as the B2 part—amounts to this: Is that money to be handled separately—the first \$340,000 of it in trust for the beneficiaries specified in trust number 12 and the balance, if any, in trust for distribution among educational institutions selected by the Committee of the Foundation; or does it fall to be handled (with the B2 money) upon trust number 13? Counsel for Wycliffe College, the Dominion Executive of the Girl Guides, the Canadian Military Institute, St. Thomas Church, St. Catharines, and the St. Catharines General Hospital (donees of 13 out of the 17 shares into which the \$340,000 is divided) contended for the first of these opposed constructions; Mrs. Leonard's executors submit their rights to the Court, their counsel, however, mentioning the fact that any share that may turn out to be part of Mrs. Leonard's estate will, under her will, be devoted to charitable purposes; counsel for the Committee of the Leonard Foundation contend for the secondly mentioned construction.

The principle upon which this question of construction is to be dealt with is to be found, I think, in the cases cited by Mr. Rowell; *Hindle v. Taylor* (1855), 5 DeG. M. & G. 577, 43 E.R. 994; *Boyd v. Boyd* (1863), 9 L.T. 166; *Trew v. Perpetual Trustee Company et al.*, [1895] A.C. 264. In *Hindle v. Taylor* Lord Cranworth said, (p. 594) “. . . in almost all cases, it is not a reasonable way of reading a trust, created by reference to other trusts, to consider everything as there repeated, and so to make it a duplication, as it were, of trusts in the nature of charges,” and in *Trew v. Perpetual Trustee Company et al.* Lord Hobhouse, writing the judgment of the Judicial Committee of the Privy Council, said that this opinion had been recognized as sound in subsequent cases. The Judicial Committee rejected the suggestion that where there is a trust by reference “the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first.” They could not “accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges.” The intention or effect of a particular will may be that there shall be such multiplication;

but "in the absence of anything in the will to shew such an intention, the rule is that the Court will not impute it to the testator."

The trustees are directed out of part B2 of the residuary estate, if the value of that part exceeds \$340,000, to pay legacies—each legatee taking one or more units of \$20,000 each—and then to hold the remainder of the part for five years, accumulating the interest, and at the end of the five-year period to distribute that remainder with its accumulations among five residuary legatees selected by the Committee of the Leonard Foundation. The five residuary legatees thus are to have the part B2, less the seventeen 20,000-dollar units. And so, whether the legacies are or are not properly called "charges" upon part B2, they are surely something such as is meant by the expression in the *Trew* case, "charges upon the trust estate, or trusts in the nature of charges." In *Boyd v. Boyd, supra*, a sum of £187,500 had been bequeathed to trustees in trust to pay the dividends to the testator's son Robert during his life and after his decease to raise and pay, out of the sum of £187,500 and its investments, £5,000, for each of Robert's children, and to stand possessed of the residue of the said sum of £187,500 upon trust for Robert's son Walter for life and after his death upon certain other trusts; and the Vice-Chancellor in his judgment called the gifts of £5,000 each to Robert's younger children "charges". I think that if those gifts were charges the seventeen shares of \$20,000 each carved out of part B2 in the present case are charges also.

The portion of the B1 part of the estate about which the question arises is to be held by the trustees "upon *similar* trusts, terms and conditions and for similar objects and purposes as the B2 part;" and counsel for Wycliffe College and for the other beneficiaries who take the same position point out that it would have been quite simple, if it was intended that there should be no double portions, to say, "the trusts upon which the B2 part", or "the *same* trusts", or to say that when the money forming a portion of part B1 of the estate was no longer needed for the education of the beneficiaries it should fall into part B2. Of course that is so, but I do not think that much importance is to be attached to that fact. As is said in a case cited by Mr. Rowell, *Commonwealth v. Fontain* (1879), 127 Mass. 452, "The word 'similar' is often used to denote a partial resemblance only.

But it is also often used to denote sameness in all essential particulars." And in this very will (trust number 8) the testator directs that, upon failure of certain declared trusts, one half of share A of his estate shall be held upon the *same* trusts, terms and conditions as share B. Both sides derive comfort from this use of the word *same* in the one place and the word *similar* in the other; but, as I read the cases that have been referred to, the decisions have turned, not upon a minute examination of the words, but upon the principle that no intention to double the charges is to be imputed to the testator in the absence of words clearly indicating his intention. In *Boyd v. Boyd*, *supra*, the testator, after disposing of the £187,500 in the manner that has been set out, and after bequeathing other moneys to his daughters, proceeded to direct that the residue of his estate should be divided into five parts, one of which was to be held by the trustees "upon such trusts, and under and subject to such powers and provisions" as were in the will "expressed concerning the said sum of £187,500"; and the Vice-Chancellor, referring (as has been stated) to the gifts of £5,000 to each of Robert's children as "charges" upon the £187,500, applied the principle of *Hindle v. Taylor* (1855), 5 DeG. M. & G. 577, 43 E.R. 994, and decided that Robert's younger children were not entitled to double portions; that is to say that they did not take £5,000 each out of the residue. The only difference, I think, between that case and the present is that here we have *similar* trusts, while there the expression was *such* trusts. But neither in *Boyd v. Boyd* nor in *Hindle v. Taylor* (where also the word was *such*) nor in *Trew v. Perpetual Trustee Company* (where the words were "upon the trusts hereinbefore declared with reference", etc.) was any stress laid, in the judgments, upon the precise form of words used; and I think that in the present case it would be quite unjustifiable to impute to the testator an intention which would not have been imputed to him if he had used the word *same* rather than the word *similar*.

Mr. Denison for Wycliffe College cited, and relied to a great extent upon, *In re Marke Wood*; *Wodehouse v. Wood*, [1913] 1 Ch. 303, affirmed [1913] 2 Ch. 574; *In re Beaumont*; *Bradshaw v. Packer*, [1913] 1 Ch. 325; *In re Florence*; *Lydall v. Haberdashers' Co.* (1917), 87 L.J. Ch. 86; 117 L.T. 701; *In re Campbell's Trusts*; *Public Trustee v. Campbell*, [1922] 1 Ch. 551.

The question in *In re Marke Wood* was whether, a fund having been settled on certain trusts with a hotchpot clause and a second fund having been settled by reference to the trusts of the first, the testator intended to make one fund with a hotchpot clause extending over the whole. For a complete understanding of the case it is necessary to read carefully the terms of the will as set out at considerable length in the reports; but for the purposes of the present case the summary contained in the judgment of Cozens-Hardy M.R. suffices. The testator had two sons and one daughter. In his will he made provision for each son for life followed by provisions for children and remoter issue as should be appointed, and in default of appointment equally. There was a hotchpot clause applicable to the property so given to the son for life and to his family—no child who or whose issue should take a share by appointment was to take any part of the fund remaining unappointed without bringing the share appointed into hotchpot—which clause, according to its plain and grammatical construction, was applicable to that property of which the son was made tenant for life, and that only. Then there was a provision made for the daughter, who again took for life, and for her issue, with another hotchpot clause. Provision was made for the event which had happened of one of the three children dying without issue. The share the trusts of which had failed was to go over to one or both of the remaining children and their issue. This was a referential trust. There was no further hotchpot clause. A son had died without issue. The question was whether, the referential trust having come into operation, the property which went over was subject to the original hotchpot clause applicable to the first property, or whether there was a new hotchpot clause to be inserted by reference applicable only to the share that so went over. Counsel contended that there was “a sort of presumption applicable to (the) case analogous to that which was laid down by Lord Cranworth in *Hindle v. Taylor*”—which case, so far as the Master of the Rolls was aware, had never been questioned, and had certainly been approved ever since. But the Court rejected that contention. In the opinion of the Master of the Rolls, there was “no law and no presumption applicable to a case” of the sort under consideration; the case depended upon the true meaning and effect of the will as a whole; and, as was said by Swinfen Eady L.J., the true con-

struction of the will required that the funds should be kept separate. One very strong reason why they must be kept separate appears in the judgment of Neville J.: "... if you amalgamate the two hotchpot clauses you do alter the trusts of the first fund which were declared without reference to anything else, and you alter them because another fund has been settled by reference to the settlement of the first fund." In my opinion, nothing in the *Marke Wood* case helps in the discussion of the case now under consideration.

In re Beaumont, Bradshaw v. Packer, [1913] 1 Ch. 325, also is entirely different from the present case. By a settlement made on a lady's marriage she was empowered to appoint that the trustees of the settlement should raise out of the settled fund any sums not exceeding in the whole £2,000 and pay them to her for her separate use. Her father by his will left property to his trustees (who were not the trustees of the marriage settlement) in trust for her "upon the same trusts and with and subject to the same powers" as were in her marriage settlements contained "with respect to the funds thereby settled". There being separate settlors, separate funds, and separate sets of trustees, it was held that the lady was entitled to raise by appointment, out of the property left by the will, the sum of £2,000. *Hindle v. Taylor* and *Trew v. Perpetual Trustee Company* were discussed, but only to be contrasted with *Cooper v. Macdonald* (1873), L.R. 16 Eq. 258, and distinguished. In *Cooper v. Macdonald*, where property was specifically devised for life with power to the devisee to appoint an annuity not exceeding one-third of the income, and residuary estate was given "upon and for the trusts and purposes, and with, under, and subject to the same or like powers" as should correspond with those expressed concerning the estates specifically devised, it was held that the testator had in effect increased the total amount of income of which the maximum charge was not to exceed a certain aliquot part. If the annuity which a tenant for life was empowered to charge upon the specifically devised estates had been one of (or not exceeding) a fixed annual amount, Lord Selborne would have been of opinion that "the general rule stated by Lord Cranworth in *Hindle v. Taylor* against multiplication of charges under a trust created by reference to other trusts" would have applied. But the case

is different when the power is to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. In such a case, said the Lord Chancellor, "the rule of proportion still holds; but the intention is that the power, limited by that rule, shall be applicable to the added as much as to the original property." In my opinion, *In re Beaumont* and *Cooper v. Macdonald*, if they are of any importance here, tend to support Mr. Rowell's argument, rather than Mr. Denison's.

In re Florence; Lydall v. Haberdashers' Co. (1917), 87 L.J. Ch. 86; 117 L.T. 701, was just a case of difficulty in interpreting a will and a codicil together and ascertaining the testator's intention. The testator bequeathed to each of three institutions £10,000; to the British Museum, £1,000; to each of a number of named hospitals, £1,000. Then, after some other gifts, he directed that his residuary estate should be divided amongst "the following beforementioned institutions in the proportions of their respective legacies, namely", and he repeated the names. By a codicil he revoked "the nine several legacies of £1000 each bequeathed by my will to the following hospitals," naming them. The question was whether or not the revocation of the legacies to the nine hospitals was, either expressly or by implication, a revocation of the shares of residue given to those hospitals. It was held, for reasons which in my opinion do not touch the present case, that the gifts of the shares of residue had not been revoked; for "the dispositions of a will are not to be disturbed more than is necessary to give effect to a revocation by codicil."

The effect of *In re Campbell's Trusts; Public Trustee v. Campbell*, [1922] 1 Ch. 551, is thus stated in the 1935 Supplement to Halsbury's Laws of England in the annotation of vol. 25, art. 1217, in words taken largely from the last paragraph of the judgment of Russell J.: "Where separate funds are settled by separate settlors at distinct times by separate instruments, the trusts of which are declared by reference to an original fund, the funds cannot be treated as an aggregate fund for the purpose of hotchpot or multiplication of charges or any other purpose. Each settlement must be treated as a separate settlement in which, by reference, are written out the referential trusts referred to." In the judgment *Cooper v. Macdonald, Trew*

v. Perpetual Trustee Company, In re Beaumont, In re Marke Wood, and other cases are discussed; but I do not find any statement of the law which, as I read it, points to the conclusion that in the case in hand an intention to duplicate charges upon the trust estate is to be imputed to the testator.

The questions submitted will be answered in the manner that has been indicated.

As to the costs; the costs of the trustees, of the General Committee of the Leonard Foundation, of Wycliffe College, and, subject to what is about to be said, the costs of all persons and corporations represented on the motion will be paid by the trustees out of the B2 part of the estate, those of the trustees being taxed as between solicitor and client. But upon a motion made by the trustees for directions, Hope J. ordered that Wycliffe College be appointed to represent, on this motion, the other beneficiaries who were in the same interest in respect of the B2 part of the residuary estate, unless those others or any of them should appear by counsel on the hearing, as they should be at liberty to do if so advised, at their own risk as to costs. Counsel for some of those other beneficiaries did appear and were heard. I think that these beneficiaries were not bound to leave their interests in the hands of counsel retained by Wycliffe College, and that they ought to have some moderate allowance of costs out of the estate. But I think also that it was not necessary that there should be three counsel on the same side, and that the taxing officer ought to see to it that the burden on the estate is not unduly increased by what has been done.

Order accordingly.

20th April 1936. The St. Catharines General Hospital and The Girl Guides Association, Canadian Council, appealed from the above judgment, and the appeal was heard by LATCHFORD C.J.A. and RIDDELL and MIDDLETON JJ.A.

Everett Bristol, K.C., and *M. A. Seymour, K.C.*, for the appellants.

W. S. Montgomery, K.C., for the trustee.

Hon. N. W. Rowell, K.C., and *H. Cassels, K.C.*, for the Leonard Foundation, respondents.

J. Shirley Denison, K.C., for Wycliffe College.

At the conclusion of the argument THE COURT delivered judgment orally, dismissing the appeal with costs, if asked.

Appeal dismissed.

Solicitors for the trustee: Malone, Malone & Montgomery, Toronto.

Solicitors for the Committee of the Leonard Foundation: Cassels, Brock & Kelley, Toronto.

Solicitor for Wycliffe College: J. Shirley Denison, Toronto.

Solicitors for the executors of the estate of Kate Leonard: Collier & Schiller, St. Catharines.

Solicitors for St. Thomas Church, St. Catharines and for the St. Catharines General Hospital: Seymour & Lampart, St. Catharines.

Solicitors for the Girl Guides Association: White, Ruel & Bristol, Toronto.

[McTAGUE J.]

[COURT OF APPEAL.]

Sun Life Assurance Company of Canada v. The Sisters Adorers of the Precious Blood et al.

Companies and Corporations—Legislative Powers—Corporation Incorporated by Act of Province of Canada—Activities of Corporation in Two Provinces—Effect and Validity of Dominion and Ontario Legislation—An Act respecting the Roman Catholic Episcopal Corporation of Ottawa, 1932 (Ont.), c. 103.

There is nothing in *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136, which prevents a corporation created by the Dominion legislature from applying to a Provincial legislature for the grant of a power to be exercised in that Province with regard to its property and civil rights, and additional to, rather than inconsistent with, the powers with which it was invested on incorporation, and if legislation is enacted pursuant to such a request it will be *intra vires* and valid. The Roman Catholic Episcopal Corporation of Ottawa was incorporated, with other such corporations, by a statute of the Province of Canada of 1849, 12 Vict. c. 136, its activities being limited to Lower Canada, except that it was empowered to hold and enjoy lands in Upper Canada as well. The diocese extended into both Ontario and Quebec. In 1883 a statute, 46 Vic., c. 64, was enacted by the Ontario Legislature, declaring its rights and capacities in that Province. A Dominion statute, 47 Vict., c. 104, declared all the provisions of both the earlier statutes applicable to the corporation. In 1932, An Act respecting the Roman Catholic Episcopal Corporation of Ottawa, 22 Geo. V, c. 103, was passed by the Ontario Legislature, declaring that the Corporation had power, *inter alia*, to borrow money or to guarantee the debts of any Roman Catholic corporation, organization, etc.

Held, this last statute was *intra vires*, and its effect was to validate, if it was not already valid, the guarantee sued on in this action. The case was not within *Dobie v. Temporalities Board*, *supra*, since the corporation was neither destroyed nor interfered with in any way. The matter fell rather within the principle enunciated in *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96. The corporation being a corporation sole, there was no shareholder who could object that he had acquired his shares on the understanding that the corporation had no power to give a guarantee. The corporation, being a statutory one rather than one created by charter, was within the rule in *The Directors etc. of Ashbury Railway Carriage and Iron Company (Limited) v. Riche* (1875), L.R. 7 H.L. 653, rather than that in *Bonanza Creek Gold Mining Company, Limited v. The King*, [1916] 1 A.C. 566, 10 W.W.R. 391, 34 W.L.R. 177, 25 Que. K.B. 170, 26 D.L.R. 273.

AN action upon a mortgage, brought against both the original mortgagor and the guarantor thereunder. The facts, and the respective contentions of the parties, are fully stated in the judgment of McTague J.

17th and 18th March 1937. The action was tried by MCTAGUE J. without a jury at Ottawa.

J. A. Robertson, and *A. Macdonald*, for the plaintiff.

Hon. L. Cote, K.C., for the defendant Episcopal Corporation.

21st April 1937. MCTAGUE J.:—The action is on a mortgage dated 22nd June 1922. The plaintiff as mortgagee sues to recover \$58,872.38, being the amount of the mortgage principal and interest thereon to 28th November 1936. As against the Sisters Adorers plaintiff's claim is based on a covenant to pay, and as against the Episcopal Corporation, on a guarantee of payment contained in the mortgage, the Episcopal Corporation being a party to the mortgage for the purpose of executing the guarantee.

The Sisters Adorers, a body corporate with head office at Ottawa, do not defend. The Roman Catholic Episcopal Corporation denies liability on the guarantee on two grounds. In the first place, it asserts that it does not possess the power to give and execute the guarantee, and that the guarantee is *ultra vires* of its power and capacity and void and unenforceable by the plaintiff. In the second place, it takes the position that the guarantee was executed during the vacancy of the archbishopric of the Roman Catholic Diocese of Ottawa by the Most Reverend Monsignor L. N. Campeau, the Administrator of the Diocese, and that under the statutes incorporating the Episcopal Corporation Monsignor Campeau was not empowered to execute

the guarantee, and therefore it is void and unenforceable by the plaintiff.

The defence involves a determination of the question as to whether an Act of the Ontario Legislature, 22 Geo. V, 1932, c. 103, is *intra vires*. The Attorney-General of Canada and the Attorney-General of Ontario were notified under the provisions of The Judicature Act but neither was represented at the trial. No doubt, while the matter is of importance to the litigants, it was not regarded as of sufficient public interest to warrant intervention by the respective Attorneys-General.

The facts are not in dispute. Those most pertinent to the issue may be summarized as follows: The Sisters Adorers, prior to the mortgage here in question, had obtained from the plaintiff a loan of \$100,000 for the purpose of constructing a convent and chapel in the city of Ottawa. Finding the money insufficient for the purpose, they applied to the plaintiff for an additional loan of \$50,000, to be secured by a mortgage second to a prior one to the plaintiff for the sum of \$100,000 already advanced. The plaintiff agreed to make the additional loan upon the condition that the Episcopal Corporation would guarantee repayment. The plaintiff advanced to the Sisters Adorers the sum of \$50,000 and on 22nd June 1922 the Sisters Adorers executed and delivered to the plaintiff a mortgage securing repayment of the sum of \$50,000 and interest at 6 per cent. per annum. The Episcopal Corporation purported to be a party to the mortgage as party of the third part. The mortgage contained the following:

“And the said party of the Third Part (The Roman Catholic Episcopal Corporation of Ottawa), in consideration of the premises and the sum of One Dollar of lawful money of Canada, now paid by the said Mortgagees, the receipt whereof is hereby acknowledged, doth hereby guarantee the payment of the said principal money and all interest thereon on the days and times herein mentioned, and doth hereby covenant and agree with the said Mortgagees that, in case default shall be made in the said payments or any of them the said party of the Third Part (The Roman Catholic Episcopal Corporation of Ottawa) shall, upon notice in writing being given of such default to the said party of the Third Part (The Roman Catholic Episcopal Corporation of Ottawa) by the said Mortgagees, thereupon forthwith pay to the said Mortgagees all sum or sums so in

default under the within mortgage, and such notice may be effectually given from time to time to the said party of the Third Part (The Roman Catholic Episcopal Corporation of Ottawa) by mailing such notice, postage prepaid, addressed to 'The Roman Catholic Episcopal Corporation of Ottawa, Ottawa, Ontario.' "

To the mortgage was affixed the seal of the Episcopal Corporation and it was executed:

"The Roman Catholic Episcopal Corporation of Ottawa,
"L. N. Campeau, .
"Administrator"

Monsignor Campeau's execution was witnessed by Monsignor Joseph Lebeau, Chancellor of the Diocese. It is admitted that the plaintiff made the loan of \$50,000 believing the guarantee to be valid and binding upon the Corporation and relying on it. The archbishopric of the Roman Catholic diocese of Ottawa was at the time of the execution of the guarantee vacant due to the death of Archbishop Gauthier on 19th January 1922, and remained vacant until 20th September 1922. It is admitted that following the death of Archbishop Gauthier, Monsignor Campeau was appointed Administrator Vicar-Capitular and Monsignor Joseph Lebeau was appointed Bursar or Econome of the Diocese. The seal affixed to the mortgage in question is admitted to be the seal of the Corporation and the signatures are admitted to be the signatures of Monsignor Campeau and Monsignor Lebeau. It is also admitted that the Episcopal Corporation did not repudiate the guarantee or its validity until after the issue of the writ and that it was the petitioner to the Legislature of Ontario for the Act of 1932, and that at that time the guarantee here in question was the only guarantee then in existence purporting to be made by the Episcopal Corporation. Default in payment occurred and notice was given as required by the guarantee.

To understand clearly the defence set up by the Episcopal Corporation it is necessary to keep in mind that the diocese of Ottawa has from its beginning extended into both Ontario and Quebec. On that fact is founded the main defence offered.

By an Act of the Province of Canada, 12 Vict. 1849, c. 136, various bishops of the Roman Catholic Church in Lower Canada and their successors were incorporated, each as an individual

corporation. Among these was the Right Reverend Joseph Eugène Bruno Guigues, Bishop of Bytown (now Ottawa) and his successors by the name "The Roman Catholic Episcopal Corporation of Bytown". The Act provided that each of the petitioners and his successors by his separate name should have perpetual succession and a common seal and should "from time to time and at all times hereafter, be able and capable to have, hold, purchase, acquire, possess and enjoy, for the general use or uses eleemosynary, ecclesiastical or educational, of the said church, or religious community, or of any portion of the same within his district any lands, tenements or hereditaments within the Province of Canada." It is to be noted that there is nothing in the Act dealing with the general borrowing power of the Corporation, its right to pledge its assets generally or to guarantee the debt of another person or corporation. The Act provides for the form of execution of documents having to do with conveyance of land and various other matters of that kind. It is important considering the nature of the defence to refer particularly to s. 10:

"And be it enacted, That this Act shall extend only to Lower Canada, (except that the said corporate bodies may respectively acquire, hold and enjoy lands and hereditaments in any part of this Province for the purposes aforesaid,) and shall not in any wise extend to or affect Upper Canada."

Except that by a further Act of the Province of Canada in 1861, 24 Vict., c. 128, the name of the Corporation was changed to "The Roman Catholic Episcopal Corporation of Ottawa" there was no further legislation respecting the Corporation until 1883.

In 1883 the then Bishop of Ottawa petitioned the Ontario Legislature to pass an Act respecting the Episcopal Corporation, and as a result 46 Vic., c. 64, was enacted. It will be remembered that s. 10 of the Act of 1849 limited the activities of the Corporation to Lower Canada, except as to the holding and enjoying of land in Upper Canada. One would surmise from a perusal of the Act of 1883 that doubt existed in the mind of the petitioner as to just what rights the Corporation had in Upper Canada, and the way sought out of the difficulty was an Act of the Legislature of the Province of Ontario declaring its rights and capacity as far as the Province of Ontario was concerned. In my opinion, the Act does not purport to go beyond that. True, it purports to give the Corporation a general

right to borrow money on mortgages, makes certain provisions as to execution of documents and deals with how the affairs of the Corporation shall be managed in the event of sickness or absence from the diocese of the bishop. The important part is that the Act gives the Corporation power to acquire lands and dispose of them within the Province of Ontario "for the general uses and purposes eleemosynary, ecclesiastical or educational of the Diocese or any portion thereof". In other words, the Corporation receives the same rights in Ontario as it already enjoyed in Quebec under the Act of 1849. That there was some doubt existing as to the right of the Legislature to pass at least some of the provisions is evidenced by the language of s. 12:

"The provisions of this Act and each and every of them are to have and are intended to have force and effect to the extent only that the same are within the power of the Legislature of Ontario to declare and enact."

That doubt also existed in the mind of the petitioner appears certain because another petition was presented to the Parliament of Canada in the following year, 1884, as a result of which 47 Vict., c. 104, was passed. The preamble recites that the diocese is partly in one Province and partly in the other, and that there exists doubt as to its status in Upper Canada and the Act goes on, generally speaking, to re-enact the same provisions as had already been enacted by the Ontario statute of 1883. That no new corporation was intended to be incorporated is clear from the provisions of s. 9, reading as follows:

"All the provisions of the said chapter one hundred and thirty-six of the Statutes of the late Province of Canada, passed in the twelfth year of Her said Majesty's reign, and all the provisions of the said chapter sixty-four of the Statutes of the Legislature of the Province of Ontario, passed in the forty-sixth year of Her said Majesty's reign, not inconsistent with the provisions herein contained, shall be and they are hereby declared to be applicable to the Corporation."

It should be noted that in both the Act of 1883 (Ontario) and that of 1884 (Dominion), s. 8 of the old Act of 1849 was incorporated, except that the provision as to how the affairs of the Corporation were to be administered during the vacancy of the see was left out.

The next legislation which has to be dealt with is the Ontario Act of 1932, 22 Geo. V, c. 103. Part of the preamble reads as follows:

“and whereas doubts have arisen as to the power of the said corporation to borrow money on the credit of the corporation and to sign, draw, endorse, make and issue promissory notes, bills of exchange, guarantees, bonds, debentures and obligations, and to mortgage, charge, hypothecate and pledge the real and personal property of the corporation; and whereas the said corporation has prayed that the said Acts may be amended so as to remove said doubts; and whereas it is expedient to grant the prayer of the said petition”.

S. 2 then gives the Corporation the right to borrow money on the credit of the Corporation generally. S. 3 gives it the right to make, draw, and endorse promissory notes and bills of exchange.

S. 4, the important one in this case, provides:

“The said corporation may guarantee, with or without security, upon such terms as it may determine any debts of, the performance of any obligation of, and the repayment of any advances made to, or for the purposes of any Roman Catholic corporation, organization, association or society engaged in activities in or partly in the diocese of Ottawa or any officers thereof or any pastor of a parish in the diocese of Ottawa, and notwithstanding that any such corporation, organization, association, or society may not have power to borrow money, any such guarantee shall be valid and binding upon the said corporation in the same way as if such corporation, organization, association or society had power to borrow money.” It is admitted that the Sisters Adorers are a corporation within the meaning of s. 4.

S. 8 provides:

“It is hereby declared that the said corporation shall be bound for payment of all moneys heretofore borrowed by and in the name of the corporation and shall be liable on all guarantees heretofore entered into by and in the name of the corporation, notwithstanding that the corporation may not have had power to borrow such moneys or to enter into such guarantees, if such borrowing or such guarantees would have been valid if done or entered into after this Act had come into force.”

S. 12 provides:

"This Act shall be read with the Act passed in the 12th year of the reign of Her late Majesty Queen Victoria, chaptered 136, the Act passed in the 24th year of the reign of Her late Majesty Queen Victoria, chaptered 128, the Act passed in the 46th year of the reign of Her late Majesty Queen Victoria, chaptered 64, and the powers by this Act conferred shall be deemed to be in addition to the powers conferred upon the said corporation by the said Acts and in case of conflict between the provisions of this Act and the provisions of any of the said Acts, the provisions of this Act shall govern."

The Episcopal Corporation in asserting its main defence relies on *Dobie v. The Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada et al.* (1882), 7 App. Cas. 136 where it was held, according to one of the paragraphs in the headnote, that an Act of the old Province of Canada which created a corporation, having its corporate existence and rights in the provinces of Ontario and Quebec, could not be repealed or modified by the Legislature of either Province or by the conjoint operation of both, but only by the Parliament of Canada. Senator Cote argues that his client, the Episcopal Corporation, was incorporated by the Act of 1849 of the Province of Canada already referred to, and that the Act of the Ontario Legislature of 1932 purported to modify its powers and is therefore *ultra vires*.

This corporation is created by statute and not by charter. Therefore the doctrine laid down by *Bonanza Creek Gold Mining Company, Limited v. The King*, [1916] 1 A.C. 566, 10 W.W.R. 391, 34 W.L.R. 177, 25 Que. K.B. 170, 26 D.L.R. 273, does not apply, *viz.*, that in the case of a company created by charter the doctrine of *ultra vires* has no application in the absence of statutory restrictions added to what is written in the charter. Unless s. 238 of The Companies Act, R.S.O. 1927, c. 218, which provides that "Every corporation or company heretofore or hereafter created, . . . (b) by or under any special or general Act of the Parliament of the late Province of Canada, which has its head office and carries on business in Ontario, and which was incorporated with objects or purposes to which the authority of this Legislature extends, . . . shall, unless otherwise expressly declared in the Act or instrument creating it, have, and be deemed from its creation to have had, the general capacity which

the Common Law ordinarily attaches to corporations created by charter", is applicable to the Corporation, the principle laid down in *Directors of Ashbury Railway Carriage and Iron Company (Limited) v. Riche* (1875), L.R. 7 H.L. 653, is still good law, as applying to corporations created by statute as contrasted with corporations created by charter. While it is admitted that the head office of the Episcopal Corporation, if it can be said to have one, is at Ottawa in the Province of Ontario, it would seem reasonable to infer that it is not a corporation which was incorporated with objects or purposes to which the authority of the Legislature of the Province of Ontario extends. The Act of 1849 conferred upon it rights specifically exercisable in what is now the Province of Quebec. The rule which applies to this corporation then is that enunciated in *Directors of Ashbury Railway Carriage and Iron Company (Limited) v. Riche, supra*. It may be expressed in the words of Lord Haldane in his judgment in the *Bonanza Creek* case, 26 D.L.R. at p. 278:

"A similar rule has been laid down as regards companies created by special Act. The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn J. and the Judges who agreed with him had fallen when they decided, in *Riche v. Ashbury Railway Carriage and Iron Company, Limited* (1874), L.R. 9 Ex. 224, in the Court below, that the analogy of the status and powers of a corporation created by charter, as expounded in the *Case of Sutton's Hospital* (1613), 10 Co. Rep. 23a, 77 E.R. 960, should, in the first instance, be looked to. For to look to that analogy is to assume that the legislature has had a common law corporation in view, whereas the wording may not warrant the inference that it has done more than concern itself with its own creature. Such a creature, where its entire existence is derived from the statute, will have the incidents which the common law would attach if, but only if, the statute has by its language gone on to attach them. In the absence of such language they are excluded, and, if the

corporation attempts to act as though they were not, it is doing what is *ultra vires* and so prohibited as lying outside its existence in contemplation of law. The question is simply one of interpretation of the words used."

The Act of 1849 of the Province of Canada and the Dominion Act of 1884 plainly contemplated that the Corporation would carry on its activities in both Ontario and Quebec. From a plain interpretation of the words used, particularly in the Act of 1884, one would infer that it was intended that the Corporation should have capacity to receive any rights which could be bestowed upon it legally *ab extra* by the Legislatures of the very Provinces where it was to exist, if such rights were in furtherance of its right to do business in those Provinces for the purposes for which it was created. *Honsberger v. Weyburn Townsite Company* (1919), 59 S.C.R. 281, [1919] 3 W.W.R. 783, 50 D.L.R. 147.

An analysis of *Dobie v. Temporalities Board*, *supra*, does not, I think, lead to the general broad conclusion adduced by Senator Cote, and enunciated in one paragraph of the headnote. In the *Dobie* case the Quebec statute in question in effect destroyed a corporation created by the Canadian Parliament, and altered materially the class of persons interested in the funds of the corporation. In other words, the very constitution of the corporation was changed, in fact in that case, destroyed. The Quebec Legislature purported to take away capacities given by the Canadian Parliament and to substitute new ones. In my view that is not at all what was done by the Ontario statute of 1932 in this case. The purposes and capacities for which the Episcopal Corporation was incorporated by the old Act of 1849 as amended by the Dominion Act of 1884 were left absolutely intact, and all that was done by the Act of 1932 was for the benefit of the Corporation in aid of its right of contracting in the Province of Ontario.

If my view is correct, then the matter falls within the principle enunciated in *Citizens Insurance Company of Canada v. Parsons* (1881), 7 App. Cas. 96, where it was held that an Act of the Ontario Legislature imposing conditions on the manner of contracting by insurance companies within Ontario was *intra vires* of the Ontario Legislature. The case is discussed by Lord Watson in his judgment in the *Dobie* case in the following words, at p. 148:

"The case of the *Citizens Insurance Company of Canada v. Parsons* comes nearest in its circumstances to the present, as in that case the appellant company was incorporated by and derived all its statutory rights and privileges from an Act of the province of Canada, whereas the Queen Insurance Company was incorporated under the provisions of the British Joint Stock Companies Act, 7 & 8 Vict., c. 110. In both cases the validity of an Act of the Legislature of Ontario was impeached on the ground that its provisions were *ultra vires* of a provincial Legislature and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizens Insurance Company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their Act of incorporation. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the appellant if the provisions of the Ontario Act, 39 Vict., c. 31, and the Quebec Act, 38 Vict., c. 64, were of the same or substantially the same character. But upon an examination of these two statutes it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy entered into or in force for insuring property situate within the province against the risk of fire. It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario—it did not interfere with their constitution or status, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict., c. 64, on the contrary deals with a single statutory trust and interferes directly with the constitution and privileges of a corporation created by an Act of the province of Canada and having its corporate existence and corporate rights in the province of Ontario as well as in the province of Quebec. The professed object of the Act and the effect of its provisions is not to impose conditions on the dealings of the corporation with its funds within the province of Quebec, but to destroy, in the first place, the old corporation and create a new one, and, in the second place, to alter materially the class of persons interested in the funds of the corporation."

It seems reasonable to assume from the above that if the Quebec statute in question had merely purported to impose

conditions on the dealings of the corporation in question with its funds in the Province of Quebec, it would have been quite within the rights of the Quebec Legislature under the authority of the *Parsons* case. Mr. Cote argues that in *Citizens Insurance v. Parsons* the Act in question was a general one imposing conditions on all insurance companies with relation to their right of contracting in the Province of Ontario, and this is an altogether different matter. I must confess that the argument does not strike me as sound. The question of legislative validity is not dependent on whether the Legislature exercises its powers through the medium of a general Act or by way of a private Act. It depends on whether its legislative action is within the ambit of its powers under the British North America Act. In this case the Episcopal Corporation petitioned the Ontario Legislature for certain privileges in respect of its right of contracting in the Province of Ontario, and the Ontario Legislature granted those privileges purely in aid of the Corporation transacting its business in the Province in accordance with the purposes for which it was already incorporated. It seems to me that this is quite a different matter from what was dealt with in the *Dobie* case and is much more in line with what was determined in the *Parsons* case.

While it may be begging the question already determined, it seems to me there is a feature in this case absent from the various precedents referred to. It must be considered that the Episcopal Corporation is a corporation sole. As a corporation sole it made its application to the Ontario Legislature. There is no right of shareholders involved. This would seem to be another very cogent reason for holding that it cannot be heard to deny that it has the power which it sought as a corporation sole from the Ontario Legislature in 1932.

With respect to whether Monsignor Campeau had power to bind the Corporation it has first to be considered that the seal of the Episcopal Corporation was affixed to the guarantee and that the guarantee was delivered. Curiously enough, this phase of the matter has been dealt with in a case in this Court concerning the same defendant. I refer to *Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa* (1918), 44 O.L.R. 284, 47 D.L.R. 47, the judgment of Riddell J. at p. 295:

"If a corporation have a common seal, as the defendant is enabled by statute to have, the affixing of the seal alone without

any signature is sufficient if delivery takes place: *Dartford Union Guardians of the Poor v. Trickett* (1888), 59 L.T. 754—of course there must be delivery: *Derby Canal Company v. Wilmot* (1808), 9 East 360, 103 E.R. 610.”

And again, at p. 296:

“The seal is witnessed in the present case by a priest, and we must presume it was affixed by competent authority—‘*Omnia praesumuntur rite acta esse*’—and every one dealing with a corporation has the right to consider a seal on an instrument coming from the corporation to have been properly set thereto.”

In addition to this it will be remembered that at the time of execution and delivery of the mortgage here in question the see was vacant and Monsignor Campeau was Vicar-Capitular and Administrator of the diocese. The Act of 1849 provided that during any vacancy of the see the person then administering the diocese should have the same powers as were by the Act conferred upon the Archbishop or bishop of the diocese. The Ontario Act of 1883 and the Dominion Act of 1884 provided that in case the bishop should by absence from the diocese or by sickness, etc., become incapable or incapacitated to perform his duties, then his coadjutor or the person or persons administering the diocese should have the same powers as by the Acts were conferred upon the bishop. In both the Acts of 1883 and 1884 it was further provided that all of the provisions of the Act of 1849 not inconsistent with those Acts should be applicable to the Corporation. The Acts of 1883 and 1884 are silent as to the person or persons who are to have the powers conferred on the bishop during the vacancy of the see. Therefore I think that the provisions of the Act of 1849 respecting vacancy still apply, and Monsignor Campeau, as Administrator, had the power to execute the guarantee subsequently validated by the Act of 1932. S. 11 of the 1932 Act provided that in case of vacancy of the seat the Vicar-Capitular during the vacancy should have the same powers as by the Act were conferred upon the Corporation or the bishop. S. 7 of the same Act provided that execution of any guarantee by the archbishop should be conclusive evidence that such guarantee was valid and binding on the Corporation. S. 8 made the Act retroactive, and provided that the Corporation should be liable on all guarantees entered into by and *in the name of the Corporation*. It is my opinion that Monsignor Campeau’s execution of the guarantee is, both

under the Act of 1849 and under the Act of 1932, valid and binding upon the Episcopal Corporation.

Since I do not consider that effect should be given to either of the defences offered, the plaintiff should have judgment against both defendants for the amount claimed plus interest at the rate of 6 per cent. per annum on the sum of \$49,000 from 28th November 1936 to the date of judgment, together with costs of the action.

Judgment for plaintiff with costs.

9th and 10th November 1937. The Episcopal Corporation appealed, and the appeal was heard by LATCHFORD C.J.A. and MASTEN and FISHER JJ.A.

The same counsel appeared.

MASTEN J.A. (orally, at the conclusion of the argument):— I have during the course of the argument expressed my views in regard to the question at issue, but perhaps I should repeat them here in the event of this case going further, though in that case the Court reserves its right to state its reasons more fully in writing.

I agree with the statement of facts and with the reasons which are set forth at length by my brother McTague in the Court below. I do not repeat them, and desire only to supplement them by a short statement (substantially on the same lines, but perhaps from a somewhat different angle) of the reasons why in my view the Ontario legislation of 1932, 22 Geo. V, c. 103, is *intra vires* and binding and is authority not only to the appellant Corporation to give guarantees at the present time but, as is expressly provided in s. 4, validates acts and obligations theretofore incurred by the appellant.

The following is the point of view which I thus desire to stress: Undoubtedly *Dobie v. Temporalities Board* (1882), 7 App. Cas. 136, precludes a Provincial authority from interfering with the constitution of a Dominion company so as to take away any of its powers. But in that case the Quebec statute assumed (1) to destroy a corporation created by the Canadian Parliament and substitute a new one and (2) to alter materially the class of persons interested in the corporate funds.

The legislation here in question does nothing of that sort, but does assume, in the exercise of the jurisdiction over property

and civil rights in Ontario, to confer on the appellant Corporation an additional power, *viz.*, a power to give a guarantee. While the appellant is a Dominion corporation existing as an entity in Ontario, yet it is subject as to its property and civil rights in that Province to the laws of Ontario.

In my opinion there is nothing in *Dobie v. Temporalities Board, supra*, which denies to the appellant a capacity to apply to the Ontario Legislature for the grant to it of a power to be exercised in Ontario with regard to its property and civil rights, additional to, and not inconsistent with, the powers with which it was invested on incorporation. I think also that the Legislature of Ontario had power in the state of facts here existing to grant the petition of the appellant by investing it with a power to guarantee a mortgage of lands in Ontario and with the power to guarantee the fulfilment of the covenant to pay therein contained, given by an Ontario company. Moreover, it is to be borne in mind that the statute 22 Geo. V, c. 103, was passed pursuant to the petition of the appellant and that the appellant is a corporation sole without shareholders. There is, consequently, no shareholder who can put forward the suggestion that he acquired his shares because the corporation had no authority to give a guarantee.

As to whether in the case of an ordinary joint stock company such an objection would or would not be fatal to the validity of Provincial legislation, no opinion is expressed.

For the reason last stated, and apart from the question of *ultra vires*, the appellant is in my opinion estopped from questioning its power to guarantee the plaintiff's claim.

The Ontario Act of 1932 does not assume to create a new corporation. I am unable to agree with Mr. Cote's argument that where a power is given to the appellant corporation by the Act of 1932 to guarantee, that creates a new corporation or destroys the old corporation. The appellant was incorporated, in every sense of the term, in 1849, and the Act of 1932 merely gives to it certain additional powers not inconsistent with its original incorporation. Under those circumstances, it appears to me that that Act is valid so far as it relates to the guarantee now in question and notwithstanding the somewhat wide words in which it is enacted. The powers conferred must be taken to be such as are within the ambit of the authority of the Ontario Legislature and are necessarily for that purpose confined

within its geographical limits. So much is to be implied both from the form of the Act and also from the circumstance that the Legislature must be taken to have passed the Act in question having in view not only *Dobie v. Temporalities Board*, *supra*, but also the more recent cases of *Royal Bank v. The King*, [1913] A.C. 283, C.R. [1913] A.C. 77, 3 W.W.R. 994, 23 W.L.R. 315, 49 C.L.J. 331, 9 D.L.R. 337, otherwise known as the *Waterways* case, and *Ottawa Valley Power Co. v. Hydro-Electric Power Commission*, [1937] O.R. 265, [1936] 4 D.L.R. 594, and consequently that they have no power to legislate respecting civil rights outside of the Province. For these reasons I am of the opinion that the Act of 1932 is to be read as limited to Ontario and as valid and effective. It follows that the guarantee in question is valid and enforceable.

LATCHFORD C.J.A.:—I only desire to say that my brother Masten has substantially expressed the grounds upon which I base my opinion that the appeal fails and must be dismissed with costs.

FISHER J.A.:—I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors for the plaintiff, respondent: Clark, Robertson, Macdonald & Connolly, Ottawa.

Solicitors for the defendant Episcopal Corporation, appellant: Thompson, Cote, Code & Hardy, Ottawa.

[KINGSTONE J.]

[COURT OF APPEAL.]

Tolfree v. Russell and Jennings and the City of Toronto.*Negligence—Dangerous Premises—Duty of Occupant—Duty towards Trespasser or Bare Licensee—Fire and Explosion on Ship.*

One who, without invitation from the owner or any other person, goes on board a vessel moored at a dock, in the hope of soliciting orders for business, and despite warnings against trespassing, is a trespasser, or at most a bare licensee. Towards such a person, the owner's only duty is not to set a trap or to change the condition of the premises after the visitor's entry, to his disadvantage. The duty of a ship-owner in this connection is no greater than that of the owner of land in similar circumstances.

Municipal Corporations—Liability for Acts of Fire Department.

When a municipal fire department, in response to a fire alarm, goes to the premises in which the fire is, the municipal corporation, through its fire department, becomes an invitee of the owner or occupant of the premises, but it does not thereby become responsible for dangerous conditions, if any, existing on the property, of which it has no knowledge. It cannot be liable to a bystander who is injured in the course of the fire, unless negligence is established on the part of the fire department.

AN action for damages for personal injuries.

A barge, the "Enarco", owned by one Russell, since deceased, was moored at the turning basin in the harbour of Toronto. A scow, the "Virginia", also owned by Russell, was moored in such a way that the only convenient access to the Enarco from the quay was by crossing the deck of the Virginia. On the Virginia's deck was a wooden sign bearing the words "No trespassing". On one of the city streets near by, and in plain view of anyone using that street, was another wooden sign bearing the words "No Trespassers".

On 23rd July 1934, at about 11.30 a.m., a fire broke out on the Enarco. The fire department was immediately called, and within half an hour the fire appeared to have subsided and to be under control, although some smoke was still visible. At about 12.25 p.m., without warning, there was a sudden and violent explosion and a large portion of the deck was blown upwards, causing the death of three persons and serious bodily injury to eleven others. Russell, the owner of the barges, who was then on the Enarco, received injuries as the result of which he died two months later.

The plaintiff was employed as sales manager of a timber company, whose office was situated in the neighbourhood of the turning basin. Having previously noticed signs of activity

there, he went to see if any materials could be sold to the owner of the vessels moored there. He knew Russell, and had had some business dealings with him, but did not then know that he was the owner of these barges. On his way, the plaintiff saw the firemen and their equipment, both on shore and on the deck of the Enarco, and also a slight haze rising from the Enarco. He apparently proceeded on to the Enarco, with a view of seeing Russell, and the trial judge found as a fact that the plaintiff was on the Enarco at the time of the explosion. He said that he had not observed the two signs, and he did not seem to have appreciated the fact that there had been a fire and that it was not yet completely extinguished. He had himself no recollection of going on the Enarco, or of the explosion.

The plaintiff was very severely injured by the explosion, and he sued both the executors of Russell's estate and the City for damages.

11th to 15th January, 22nd to 26th February, 1st to 3rd March, and 5th April 1937. The action was tried by KINGSTONE J. without a jury at Toronto.

V. Evan Gray, K.C., and *J. L. McLennan*, for the plaintiff.

John Jennings, K.C., and *R. D. Jennings*, for the executors, defendants.

C. M. Colquhoun, K.C., and *F. A. A. Campbell, K.C.*, for the City of Toronto, defendant.

6th May 1937. KINGSTONE J. (after reviewing the evidence):—The only conclusion I can reach on all the evidence, even with the assistance of, and suggestions made by, the expert witnesses, is that the origin and cause of the fire and explosion have not been fully and satisfactorily established.

Mr. Gray for the plaintiff bases his claim against the Russell estate on several grounds which may be shortly stated as follows:

(1) bringing the Enarco into the harbour in a condition which constituted a fire trap,

(2) allowing the Enarco to be moored at the turning basin without any warning of the inherent danger,

(3) the negligent use of oxygen and acetylene torches by workmen, which caused the fire,

(4) failure to provide suitable fire-extinguishing apparatus and equipment,

(5) failure to warn the plaintiff and others of the danger. As against the defendant corporation the negligence charged is:

(1) permitting the vessel *Enarco*, inherently dangerous by reason of its construction, condition, cargo and crew, to be and remain moored in the turning basin, and permitting repairs and reconstruction to be undertaken in that place,

(2) while in control of the vessel on fire, failing to take proper and effective means to prevent the explosion,

(3) breaking open the deck of the *Enarco* and pouring water upon and into the hold of the vessel containing gas and oils,

(4) failing to exclude the plaintiff from access to the dangerous vicinity of the vessel or give due warning,

(5) failing to provide competent servants and effective equipment for dealing with the fire and to prevent the explosion.

The City, as it appears, is sued in a double capacity. The Toronto Harbour Commission, it is argued, as statutory agent of the City is liable for permitting an oil barge to be repaired in the Toronto Harbour and for failing to exercise proper control over the repairs and reconstruction work, and the City firemen are liable for their negligent conduct in fighting the fire as alleged above.

Many of the points raised by counsel for the plaintiff and so well and ably argued by Mr. Gray, in the view I take of this case, do not need to be discussed. The first point to be determined and the main difficulty that confronts the plaintiff at the outset is the question what duty the defendants, or either of them, owed to the plaintiff. If Tolfree came on the boat as a mere trespasser, or a bare licensee, much that has been said and argued on his behalf can avail him little or nothing. Taking his own statement as his reason for visiting these vessels, *viz.*, for the purpose of getting an order for his company for ship timber, in what capacity, on this day and at such a time, without any invitation express or implied, was he when standing on the *Enarco's* deck? These vessels were moored in this turning basin at a place where the public have no right of access and where, it appears from the evidence of the Harbour Master, they were permitted to berth. The 12 to 18 inches of old sludge at the bottom of the hold of the *Enarco* no doubt contained some oil residuum and mud which could not be described as a substance dangerous to the public, or even to those who had occasion to

go on the boat. Petroleum in itself is not inherently dangerous or explosive, though it may under certain conditions be inflammable. On the day of the fire, when the plaintiff, having driven on Commissioners Street to or near Carlaw Avenue, approached on foot the burning boat, he could not have failed to observe the hose reel, the hose itself stretched across the street and later on, if not then, as he said he did, the firemen still on the Enarco. He passed close to the sign "No Trespassers" south of Commissioners Street and when he arrived on the Virginia again he should have seen, if he did not see, the sign in plain view "No trespassing" on the deck of the Virginia. Had he remained even then on the Virginia he would have been in a place of safety, but he pushed his way even further on to the boat where the firemen were still occupied with their duties. Can it be said that his presence on the deck of the Enarco was other than that of a trespasser? I think not. His anxiety to do business with the owner or proprietor can put him on no higher plane. The explosion must have taken place within a minute or so of the time he set foot on the deck of the Virginia. A man who is upon somebody else's property must justify his presence there. These vessels were the property of J. E. Russell and *prima facie* the plaintiff had no right to be there without an invitation given by the proprietor. Clearly there was a notice and a warning to the public, of whom Tolfree was one, that it (the public) was not to trespass. Tolfree says he saw Russell passing ahead of him on the Virginia to the deck of the Enarco, but nowhere in the evidence was it suggested that Russell was aware of the plaintiff's presence or that he tacitly permitted it. The case of *Robert Addie and Sons (Collieries), Limited v. Dumbreck*, [1929] A.C. 358 in clear language defines a trespasser, "The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to." The fact that Tolfree had in his own mind that he was going on these scows with a business object in no way takes him out of the trespasser class. It is, of course, elementary law that the proprietor or owner is not, if he is aware that a trespasser is on his land, permitted to do something upon his land to the injury of the trespasser. If the trespass arises and then the proprietor does some active act of negligence, he is liable to the trespasser. Mr. Gray laid great emphasis on the case of *Excelsior Wire Rope Company, Limited*

v. Callan et al., [1930] A.C. 404. In that case the defendant company was found liable for injuries sustained by two small children who were playing with some machinery belonging to the defendant company and erected on the premises with consent of the land owner. The playing fields of the children were not separated by any fence from block, post, pulley and wire which was operated by the defendant about three times a week. These children on this occasion had been warned before the wire and pulley were put into motion, but the employees of the defendant company did not satisfy themselves that the wire was free from children. They were aware that the children played about and in the neighbourhood of this machinery and took the precaution of driving them away but did not see that all was clear and that there were no children there when they started up the machinery. Lord Buckmaster in dismissing the appeal of the company said at p. 410:

“It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children would be there and with the wire in motion, would be exposed to grave danger. In such circumstances the duty owed by appellants, when they set the machinery in motion, was to see that no child was there, and this duty they failed to discharge.”

The principle that this case establishes seems to be that even if these children were trespassers the owner or occupier could not by that fact alone escape liability if he knew or ought to have known of their presence, and set in motion machinery which caused them injury. The cause of action in the *Excelsior* case was active negligence of the occupier of the premises after the trespasser came on the property. The case at bar is substantially different. While it is clear that the owner of land cannot change the condition of his premises so as to cause injury to the trespasser after he knows the trespasser is there, without proper notice of the change to the party trespassing, the trespasser must take the premises as he finds them and the sole duty of the occupier is not to change the condition of the premises to his disadvantage. There are a number of cases in our own Courts dealing with the rights of entry upon personal property. The duty owed to the trespasser under such circumstances by the proprietor is certainly no greater than that of the owner of land. In two leading cases of *Grand Trunk Railway*

Company of Canada v. Barrett, [1911] A.C. 361, 12 C.R.C. 205, and *King v. Northern Navigation Co.* (1913), 27 O.L.R. 79, 6 D.L.R. 69, the obligation owed to trespassers by the owners of personal property is fully discussed. It was held by the late Mr. Justice Garrow in *King v. Northern Navigation Co.* that the only duty which the proprietor owes to a person on a boat as a bare licensee is not to deceive him by means of a trap or be guilty of any act of active negligence. The duty cast on anyone who goes on premises with which he is not familiar is well set out in the judgment of Mr. Justice Rinfret in *Canadian National Railways Company v. Lepage*, [1927] S.C.R. 575, [1927] 3 D.L.R. 1030.

Lord Sumner in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, uses these words at p. 274: "A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself. . . . The licensee is to take reasonable care of himself and cannot call a thing a trap the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it."

It must be held that Tolfree was a trespasser or at most a bare licensee and in doing what he did went from a place of safety to a place of obvious danger and was the author of his own injuries without any active interference or negligence by Russell or the employees of the City.

Having reached the conclusion that I have, both as to the facts and as to the law, there is little or no purpose in discussing the other legal aspects so ably urged by Mr. Gray. I do not think the rule of *res ipsa loquitur* can apply to the facts here. The mere fact that a fire broke out on the Enarco, which was confined to this boat, is not a circumstance that calls for the application of this rule. Again, the principle laid down in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, cannot be invoked. If a man allows a dangerous substance such as a fire to escape from his premises, he having started the fire, then the injured person may have a good cause of action. But it is the act of allowing the dangerous thing to escape from the premises that gives the cause of action. As it is not necessary for the decision in the case, no attempt has been

made by me to consider whether or not the Board of Harbour Commissioners is or is not the statutory agent of the City. To do so would involve a careful study of the legislation creating the Board and the enabling legislation as well as the current decisions. If another Court finds this necessary or desirable it can be done without the assistance of the trial Court.

While I am of the opinion, for the reasons given, that the plaintiff cannot recover in this action, it is proper for me to assess the damages so that any Court in Appeal taking a different view of the facts and the law may more readily dispose of it.

[His Lordship then proceeds to discuss the extent of the plaintiff's injuries, and to assess his damages at \$14,982.25 for special damages and \$65,000 for future medical, hospital and nursing services and attendances, loss of earning power, and pain and suffering, making a total of \$79,982.25.]

Action dismissed with costs if demanded.

8th, 10th, 11th and 14th June 1937. The plaintiff's appeal was heard by LATCHFORD C.J.A. and FISHER and HENDERSON JJ.A.

The same counsel appeared.

On the third day of the argument, counsel for the plaintiff, appellant, announced that he abandoned the appeal as against the executors of the Russell estate, and on consent of counsel for those defendants, the appeal was dismissed without costs as against them. The appeal proceeded as against the City.

At the conclusion of the argument, the Court delivered judgment orally, dismissing the appeal as against the City, and stated that written reasons would be delivered later.

16th June 1937. The written judgment of the Court was delivered by

HENDERSON J.A.:—At the conclusion of the argument of counsel for the appellant, we all found ourselves in complete agreement with the conclusions reached by the learned trial judge, and with the reasons therefor as admirably stated in his careful, clear and cogent reasons for judgment.

It is quite evident that the learned trial judge was deeply sensible of the terrible injuries suffered by the unfortunate appellant, and sympathetic, as we are, with his desire to find someone responsible for them. Nothing more need have been

said but for the course adopted by the appellant's counsel during the hearing of the appeal. The argument began on Tuesday and continued throughout Thursday, and on Friday at the opening of Court plaintiff's counsel announced that he abandoned the appeal as against the Russell estate, and on consent of counsel for the Russell estate, the appeal was accordingly dismissed without costs as against that estate.

Counsel continued strongly to press his appeal as against the corporation, the City of Toronto, and in view of the alteration in the position of the parties created by this situation, we have to add some observations.

The judgment of the learned trial judge being thus affirmed as to the respondent the Russell estate, the plaintiff becomes a trespasser on the property of the Russell estate, namely, the boat in question, but in this aspect of the case, it matters not whether *qua* the Russell estate, the plaintiff is a trespasser, a bare licensee or an invitee. The respondent, the City of Toronto, was neither owner nor occupier of the premises, namely the Enarco, but simply there in the performance of a service which its fire department was called upon to perform, and having no relation to the plaintiff.

The case against the corporation is put on two grounds: firstly, that the Toronto fire department is a branch of the City's service for whose conduct in the performance of its duties the corporation is responsible, and that on the occasion in question its duties were performed with such ignorance of what the occasion called for and so improperly as to constitute it the cause of the explosion which injured the plaintiff; and, secondly, that the corporation's statutory agent is the Board of Harbour Commissioners, and that this Board was guilty of misconduct to the plaintiff in permitting the three boats in question to be in the turning basin of the harbour at all.

It is well known that when an alarm of fire is received in one of the fire halls of the fire department, and its location is given, the essence of what is called for is speed in getting men and equipment to fight the fire, to the place of danger. On this occasion, on responding to the alarm, the firemen found the hatchway on fire on the deck of the Enarco and proceeded to do what was their plain duty to do, namely, to subdue the fire, which they apparently succeeded in doing. The officer in charge, District Chief Dickson, appears at this stage to have

had a ladder put down the hatchway into the hold and to have gone down to examine the hold for any signs of fire. He saw the apparently empty hold, empty except for some bilge water and sediment on its bottom, of a boat not in cargo but out of commission, and evidently undergoing extensive repairs in order to put her in commission. He came up the ladder, reported no fire and directed his men "to wash her down again", evidently a precaution for greater safety, and at that moment and before this order could be carried out, the explosion occurred.

It is said that a few minutes before, a puff of flame came up the hatchway which scorched the face of one of the firemen. It is urged that had this been accepted as a warning of what was to follow, there was sufficient time before the explosion occurred to have warned everybody to escape to a place of safety. We are unable to agree that the fact that a puff of flame came up the hatchway indicated what was to follow. It must be of the commonest occurrence for gases to form and puffs of flames to be encountered in the course of fighting any fire, and this is the evidence in this case, particularly that of the Chief of the fire department. It is also said by one witness that some mid-continent crude oil had been, on the preceding day, pumped through a hose from the Port Credit boat to the Enarco. This is denied, and the learned trial judge finds it to be untrue, and accepts the evidence of the witness to the effect that it was bilge water which was pumped into the hold of the Enarco in order to bring her to the level of the dock. It is difficult to understand why oil would be pumped into the empty hold in the circumstances.

We are left to the evidence of District Chief Dickson's conduct as told by other witnesses. He did not give evidence as he died in the performance of his duty.

As against the respondent, the corporation of the City of Toronto, the case begins with the receipt of an alarm of fire. The City, through its fire department, became an invitee on the property of its co-defendant, but surely did not thereby become responsible for the conditions of danger, if any, as then existing on the property, of which it had no knowledge.

These are the facts upon which liability is sought to be imposed upon the City corporation, on the first ground stated, and in our opinion the attack entirely fails.

Upon the second ground, no evidence at all is offered in its support. For all that appears, the turning basin was in fact, and was considered by the Harbour Commissioners to be, a proper place for boats to be tied up to refit.

The plaintiff's counsel many times during his argument repeated the words "oil fire". We have already voiced our acceptance of the facts found by the trial judge. We expressly concur in his view that this was in no sense an "oil fire".

We have not discussed the authorities cited in support of the appellant's case. In the view we have taken, we find no negligence on the part of the City's employees, and therefore it becomes unnecessary to consider the cases. Neither do we express any opinion as to the contention put forward on behalf of the plaintiff that the Board of Harbour Commissioners is the statutory agent of the corporation, since it is unnecessary for us to consider that question.

The appeal will be dismissed. My Lord the Chief Justice in Appeal and my brother Fisher think the dismissal should be with costs if demanded. In my view it is not a case for costs.

Appeal dismissed with costs if demanded, HENDERSON J.A. dissenting as to costs.

Solicitor for the plaintiff, appellant: R. Alan Sampson, Toronto.

Solicitor for the defendant executors, respondents: R. D. Jennings, Toronto.

Solicitor for the defendant City, respondent: C. M. Colquhoun, Toronto.

[ROACH J.]

Bowra v. Henderson et al.

Landlord and Tenant—Breach of Covenant—Quiet Enjoyment—Right of Way over Stairway—Measure of Damages—The Short Forms of Leases Act, R.S.O. 1937, c. 159, Schedule B, clause 13—Rule 260.

Although the word "demise" in a lease creates an implied covenant for quiet enjoyment, yet where the lease is made under The Short Forms of Leases Act, R.S.O. 1937, and contains an express covenant in the statutory form, the lessee's rights are limited to a claim under the extended form of that covenant. *Davis v. Pitchers* (1875), 24 U.C.C.P. 516, followed. Where the lessee is kept out of possession of part of the demised premises by a person claiming under a paramount title derived from one only of the lessors, he can claim only against that lessor. *Bellamy v. Barnes* (1879), 44 U.C.Q.B. 315, applied. In an action for such a breach of covenant, based upon an eviction, the damages should be assessed, not only down to the trial, under Rule 260, but for the whole term of the lease. *Child v. Stenning* (1879), 11 Ch. D. 82, applied. The measure of damages should be the difference in value between the premises demised under the lease, and those actually occupied by the lessee. *Lock v. Furze* (1866), L.R. 1 C.P. 441; *Christin v. Dey*, 52 O.L.R. 308, [1923] 3 D.L.R. 1116, applied; other authorities referred to.

AN action for damages for breach of the covenant for quiet enjoyment in a lease from the defendants to the plaintiff. The facts are fully stated in the judgment.

25th May 1938. The action was tried by ROACH J. without a jury at Whitby.

T. K. Creighton, K.C., and *N. C. Fraser*, for the plaintiff.

W. E. N. Sinclair, K.C., and *J. C. Anderson, K.C.*, for the defendants.

12th August 1938. ROACH J.:—The plaintiff's claim is for damages under the covenants express or implied in two leases of lands and premises in the City of Oshawa, known as No. 11 Simcoe Street. This property is in the business area of the city and the building is two storeys in height with a basement below. The plaintiff is in possession and uses the ground floor as a retail hardware and electrical appliances store and the upstairs for storage and office space. Adjoining these premises on the north is another two-storey building owned by one Fox, the ground floor and basement of which is occupied as a pool and billiard parlour.

Inset against the north wall of the plaintiff's store and wholly south of it are two enclosed stairs, one at the front leading from the street to the second floor and another, a rear stair, starting back some distance from the front of the store

and also leading to the second floor. Beneath this rear stair is a basement stair, also enclosed but serving only the building to the north through two doors cut in the dividing wall between the two buildings, one at the top and another at the bottom of these basement stairs.

By a written agreement dated 14th October 1916 between the defendant Robert Henderson and his brother Thomas Henderson, they then being the owners of the premises in question, of the one part, and one Arthur G. Lambert who was then the owner of the premises adjoining on the north, of the other part, certain rights of way over these stairways in favour of Lambert's premises were granted or confirmed. By this agreement a right was granted to Lambert, his heirs, executors, administrators and assigns, for themselves, their tenants, servants and agents, to go up and down these rear stairs, access to which was to be obtained through doors cut in the dividing wall between the two buildings, one at the foot and one at the top of these stairs. It was also provided that the Henderson brothers, their heirs, executors, administrators and assigns, might also use these rear stairs to go back and forth from their store to the second floor above. By this agreement Lambert, his heirs, executors, administrators and assigns, were also granted the right of themselves, their tenants, servants and agents, to go up and down these basement stairs to obtain access to Lambert's basement through similar doors cut in the dividing wall between the two buildings, but no right was reserved by Henderson brothers to use these stairs. This agreement was registered in the Registry Office on 18th October 1916.

Thomas Henderson died and his estate in the premises in question devolved upon his widow Emily Louise Henderson. By a written lease dated 18th June 1935, Robert Henderson and Emily Louise Henderson demised these lands and premises to Tun Seto, Sing Seto and Chong Seto for a term of three years expiring on 31st January 1938. The lands demised are described by metes and bounds and as thus described include the lands covered by these stairs and the lease is not made subject to the rights of way conveyed by the agreement dated 14th October 1916. This lease is made in pursuance of The Short Forms of Leases Act, R.S.O. 1937, c. 159, and contains the statutory covenant for quiet enjoyment.

By indenture dated 2nd December 1935, Tun Seto and Chong Seto assigned all their interest in the said lease and in the lands thereby demised to Sing Seto.

Emily Louise Henderson died, leaving a will in which the defendants William H. Scilley, James G. McMinn and Douglas Campbell Henderson are the executors and the defendants Douglas Campbell Henderson and Helen H. Henderson are the devisees of her estate in these lands and premises.

By a lease in writing dated 13th July 1937, made in pursuance of The Short Forms of Leases Act, R.S.O. 1937, c. 159, the defendants demised the said lands and premises to the plaintiff for a term of five years from 1st February 1938, at a rental at the rate of and payable \$225.00 monthly, with an option for a further term of five years at a rental of \$250.00 monthly. This lease contains among other covenants the statutory covenant for quiet enjoyment. The lands demised by this lease are described therein by metes and bounds. This description is erroneous and the plaintiff in this action also asks rectification of the lease by having the lands properly described. The defendants admit the erroneous description and consent to this rectification by having the description corrected to cover the lands intended to be demised. As rectified to cover the intention of the parties, there is no reservation of the rights of way granted and confirmed by the agreement dated 14th October 1916.

The plaintiff for a number of years had conducted a general retail hardware and household electrical appliances business in premises a few doors removed from the premises covered by the lease in question in this action. The nature of this business was well known to the defendant Robert Henderson, who in the negotiations leading to this lease represented his co-defendants. The plaintiff's lease of these other premises was about to expire and he commenced his negotiations with Robert Henderson early in July 1937. At that time the premises in question were occupied by Sing Seto and the ground floor thereof was being used as a restaurant. In their then condition they were unsuited to the plaintiff's business and to meet the plaintiff's requirements certain additions and alterations had to be made. Accordingly the lease in question provides, firstly, that the plaintiff may at his own expense extend the building at the rear and that on the termination of the lease such extensions shall remain the property of the lessors: and, secondly, "that the

lessee may at his own expense alter the interior of the building on said lands subject to the approval of the lessors and after due inspection by an architect but at the end of the said term such alterations shall be removed by the lessee and the said building shall be restored by the lessee to its condition before such alterations were made if required to do so by the lessors."

Having obtained this lease, the plaintiff then obtained from Sing Seto an assignment of the latter's lease and the residue of the term thereby demised from 1st September 1937. This assignment is dated 9th August 1937.

The plaintiff entered into possession on 1st September 1937, and at once commenced to build the addition at the rear of the building and to make the necessary alterations to the interior of the store premises. I find as a fact that all these proposed alterations had been discussed by the plaintiff with the defendant Robert Henderson before the lease was executed. While these alterations were being made, the defendant Robert Henderson frequently came on the premises, and it is a reasonable assumption that his purpose in these frequent visits was to see what was being done by way of alterations. There was not an inspection by an architect with respect to these alterations as provided in the lease, but I find that the defendants waived compliance with this requirement through Robert Henderson, who was the representative of his co-defendants, and who acquiesced in and approved of all the alterations which were made or undertaken.

As part of these alterations the plaintiff began to remove the rear stairs and then for the first time discovered that beneath them was the basement stairway already described. One Fox, the successor in title of Lambert to the adjoining premises, objected to any interference with his right of way over the basement stairs. The plaintiff at once got in touch with the defendant Robert Henderson, who immediately came to the premises and expressed surprise at seeing these basement stairs. To anyone inspecting the building these basement stairs were not apparent because there was no entrance to them from the defendant's premises and the wall which enclosed them in the basement would readily be taken to be part of the foundation wall of the building. However inquiries at once made by Robert Henderson at the office of his solicitors sufficed to recall to him the existence of the agreement dated 14th October 1916.

He then attempted unsuccessfully to arrange with Fox for some means of access to his basement in substitution for these basement stairs.

To understand the effect of the existence of these enclosed stairs on the store covered by the lease in question I should say that each stairway is four feet wide, including the walls which enclose it. The front stairway extends back from the front of the building a distance of 18 feet 3 inches. Between the rear or east end of this enclosure and the west end of the enclosure around the rear stairs is a recessed space of 13 feet 10 inches forming an alcove between the two stairs with the ceiling depressed to a height of eight feet. Then comes the enclosure around the rear stairs which extends back a further distance of 17 feet 4 inches. The store has a depth of 105 feet 9 $\frac{3}{4}$ inches and a width of 27 feet 4 $\frac{3}{4}$ inches, except at the places where these stairways project out from the north wall, at which places the width is reduced to 23 feet 4 $\frac{3}{4}$ inches, and excepting also a small projecting area at the north side of the rear of the store which is not material so far as the rights of the parties are concerned.

I should also add that at the time the plaintiff took possession and at the time he first inspected the premises with a view to leasing them, the doorway in the dividing wall between the two stores at the foot of the rear stairs was sealed and had apparently not been used for some considerable time. Further, that Fox apparently made no objection to interference with his right of way over these rear stairs, and confined his objection to any interference with the basement stairs. However, the rear stairs could not be removed without at the same time interfering with the basement stairs.

On the evidence, the plaintiff has unquestionably suffered damage by reason of his being unable to remove these rear stairs. In addition to the plaintiff, expert witnesses, men of considerable experience in the retail merchandising of goods of the same class as sold by the plaintiff, gave evidence which impressed me favourably. They all stated that the front half of a store of this type is much more valuable than the back half. Their estimates of the value of the front half to the whole varied between 65 and 75 per cent. of the whole. In their opinion the irregularity in the north wall of this store is a major objection. It creates a congested area in the most valuable

part of the store and what they describe as a "dead space" at the rear past these projections. Displays along the north wall back of the enclosure around the rear stairs are partly hidden from the front of the store. These projections interfere with what they describe as "straight line" display. Customers will not walk to the back of a store to see what may be there. Good merchandising requires that there should be attractive and enticing displays to draw customers. All this is to a considerable extent interfered with by the projections caused by the rear stairs. In the opinion of these witnesses, for the foregoing reasons the value of the store is depreciated from 15 to 20 per cent. by reason of these projections.

The plaintiff's claim being based on the covenants express or implied contained in the lease to the three Chinese and in the lease direct to himself, must be considered under the headings of these two leases separately.

It is convenient to deal first with his claim under the lease direct to himself. The extended statutory covenant for quiet enjoyment under The Short Forms of Leases Act is as follows:

"And the lessor doth hereby covenant with the lessee, that he paying the rent hereby reserved and performing the covenants hereinbefore on his part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the lessor, or any other person or persons lawfully claiming by, from or under him".

While the word "demise" creates an implied covenant for quiet enjoyment, yet because the lease itself contains the foregoing express covenant the plaintiff's claim is limited to a claim under the express covenant. *Davis v. Pitchers* (1875), 24 U.C. C.P. 516.

The next point to consider is against whom the plaintiff is entitled to recover. The plaintiff has been kept out of possession of part of the demised premises by Fox who is the assignee of Lambert and is a person claiming under a paramount title derived from only one of the plaintiff's lessors, namely, the defendant Robert Henderson. It has been held in *Bellamy v. Barnes* (1879), 44 U.C.Q.B. 315, that a lessee ejected by an assignee of a mortgage made by the lessor's predecessor in title cannot recover damages against the lessor under a covenant for quiet enjoyment because the assignee of the mortgage was

not a person "claiming by, from, or under" the lessor. Therefore the plaintiff's claim is limited to the defendant Robert Henderson.

In dealing with the quantum of damages Mr. Sinclair for the defendant urged that, in the event that I should hold the plaintiff entitled to recover, the damages should be assessed only down to the trial, and he relied upon Rule 260, which reads as follows:

"Damages in respect of any continuing cause of action shall be assessed down to the time of the assessment".

However, in *Child v. Stenning* (1879), 11 Ch. D. 82, at p. 85, Jessel M.R. says:

"It has been held that where there has been eviction, so that you can never have another action under the covenant for quiet enjoyment, but are evicted for ever, there, of course, the damages must be assessed once for all. But where there has been no eviction, the damages are only the damages actually sustained".

I hold therefore that the damages should be assessed in this action over the whole period of the lease.

There is plenty of authority expressed in varying language as to the principle to be followed in assessing the damages. In *Lock v. Furze* (1866), L.R. 1 C.P. 441, it is stated as follows by Martin B.:

"The rule is correctly laid down by Parke B., in *Robinson v. Harman*, 18 L.J. Ex. 202, thus:—"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'."

This was a case in which the plaintiff, having been evicted for part of the term covered by his lease from the defendant by a party having a paramount title obtained from the defendant, entered into a new lease with the party having the title at a higher rental. On appeal, dealing with the principle, it was stated as follows by Channell J.:

" . . . the difference in value between the old and the new leases was not necessarily the amount; but what was done at the trial [as to this] was merely a mode of working out the principle."

This case was referred to in a case in our own Courts, *Christin v. Dey*, 52 O.L.R. 308, [1923] 3 D.L.R. 1116, in which, at p. 313, the principle is expressed by Hodgins J.A. in the following language:

"The right to damages on breach of contract has, ever since *Hadley et al. v. Baxendale et al.* (1854), 9 Ex. 341, 156 E.R. 145, been held to depend on whether they are such as arise naturally 'or such as may reasonably be supposed to have been in the contemplation of *both parties*, at the time they made the contract, as the probable result of a breach of it'."

The same principle has been followed in a number of other cases. See *Marrin v. Graver* (1885), 8 O.R. 39; *Goodison v. Crow* (1920), 48 O.L.R. 552, 58 D.L.R. 347; *Regent Tailors Ltd. v. McArthur*, 66 O.L.R. 169, [1931] 1 D.L.R. 492.

Applying this principle, I assess the plaintiff's damages under the lease direct to himself at \$1,800.00. I have arrived at this amount in the following manner: the monthly rental for the whole premises is \$225.00: proportioning this between the second floor and the balance of the premises I allocate \$25.00 to the second floor and \$200.00 to the balance of the premises: the plaintiff has possession of the whole of the second floor and for that part of the balance of the premises of which he has not been given possession I have fixed his damages on a monthly basis at 15 per cent. of \$200.00, *viz.*, \$30.00, and this monthly amount over the whole period of the lease (not including the period covered by the option) totals \$1,800.00. In this method of assessment I have taken into consideration that this judgment will be payable at once while the damages in a sense may be said to be spread out over the whole term of the lease. I have not included the period covered by the option because the plaintiff may not exercise the option and until it is exercised there is no contract.

The plaintiff's damages under the lease which was assigned to him are recoverable against the defendant Robert Henderson only, following *Bellamy v. Barnes, supra*, and cover the period from 1st September 1937, to 1st February 1938. That lease contains a similar provision with respect to alterations as is contained in the lease direct to himself and quoted above. For the same reason as applies to his claim under the latter lease, I find the plaintiff is entitled to damages under the earlier lease. The rental reserved for the whole premises in their then con-

dition for the period during which the plaintiff had possession was \$175.00 monthly. Of this amount I think it fair to allocate \$20.00 to the second floor and \$155.00 to the balance of the premises. Adopting the same method of assessment as in connection with the latter lease I find the damages on a monthly basis to be \$23.25 per month, or a total for the whole period of \$116.25.

In addition to the foregoing the plaintiff was put to an expense of \$50.25 by reason of alterations commenced and subsequently discontinued as a result of the encroachment, and the further sum of \$75.00 for relaying a brick wall, which latter amount the defendants agreed to pay.

There will therefore be judgment against the defendant Robert Henderson for the sum of \$1,966.50; and against all the defendants for the sum of \$75.00; and for rectification of the lease dated 13th July 1937, by correcting the description of the lands therein referred to, to comply with the description contained in paragraph 19 of the statement of claim, and for his costs of this action to be taxed.

Judgment accordingly.

Solicitors for the plaintiff: Grierson, Creighton & Fraser, Oshawa.

Solicitor for the defendant: W. E. N. Sinclair, Oshawa.

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